REPORTS
OF
CASES
ARGUED AND DETERMINED
IN
The High Court of Chancery,
DURING THE TIME OF
LORD CHANCELLOR ELDON.

VOLUME THE SEVENTH;

CONTAINING

FROM EASTER TERM TO THE SITTINGS AFTER TRINITY TERM INCLUSIVE, 42 GEO. III.

BY FRANCIS VESEY, JUN. ESQ.
OF LINCOLN'S INN,
BARRISTER AT LAW.

FIRST AMERICAN,
FROM THE SECOND LONDON EDITION.

WITH NOTES, AND REFERENCES TO AMERICAN CASES.

BY
EDWARD D. INGRAHAM, ESQ.

PHILADELPHIA:
M. CAREY AND SONS—CHESNUT STREET.

1821.

Lord ELDON, - - - - - - - - Chancellor.
Sir WILLIAM GRANT, Knt. - - Master of the Rolls.
Honourable SPENCER PERCEVAL, - Attorney-General.
Sir THOMAS MANNERS SUTTON, Knt. Solicitor-General.

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N. B. "*Versus*" always follows the Name of the Plaintiff.

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1802.
May 6.

WALCOT v. WALKER.

The court will not act either by giving an Injunction or an account, even upon a submission in the answer, upon a publication of such a nature that an action could not be maintained.

Injunction against an invasion of copyright, depending upon the effect of an agreement, refused till recovery in an action.

THE bill prayed an Injunction to restrain the defendants, who were booksellers, from publishing two editions of the plaintiff's works; upon a dispute as to the construction of the agreement between the parties.

The defendants by their answer admitted, that they had published in one of these editions some of the plaintiff's works, which they were not authorized to publish. As to that edition, therefore, they submitted.

Mr. Mansfield, and Mr. Pemberton, in support of the motion for the Injunction; Mr. Richards, and Mr. Johnson, for the Defendants.

Lord Chancellor.—If the doctrine of Lord Chief Justice *Eyre* is right, and I think it is, that publications may be of such a nature, that the author can maintain no action at law, it is not the business of this Court, even upon the submission in the * answer, to decree either an Injunction or an account of the profits of works of such a nature, that the author can maintain no action at law for the invasion of that, which he calls his property, but which the policy of the law will not permit him to consider his property. It is no answer, that the defendants are as criminal. It is the duty of the Court to know, whether an action at law would lie; for, if not, the Court ought not to give an account of the unhallowed profits of libellous publications. At present I am in total ignorance of the nature of this work, and whether the plaintiff can have a property in it or not. As to one of these editions, it is not [* 2]

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possible to grant the Injunction, until the right of the plaintiff has been tried in an action. The facts may alter the effect of the agreement at law; and that must be looked to as to the right in equity. It is not immaterial also, that they have been permitted to publish in their trade for six years together without an action. But, even as to the other edition, before I uphold any injunction, I will see these publications, and determine upon the nature of them; whether there is question enough to send to law as to the property in those copies; for, if not, I will not act upon the submission in the answer. If upon inspection the work appears innocent, I will act upon that submission; if criminal, I will not act at all; and, if doubtful, I will send that question to law.

Therefore let the Injunction be dissolved as to the octavo edition; with liberty to apply for an Injunction, in case the plaintiff succeeds in an action. As to the duodecimo edition, dissolve the Injunction, unless in a week they bring the books into Court. (a)

(a) In *Hogg* v. *Kirby*, the sittings after *Hilary*, 1803, the *Lord* CHANCELLOR felt considerable difficulty in granting an injunction; the title of the work containing a false assertion, calculated to impose upon the public.

[* 3]
Mar. 15, 16, 17.
May 7.
Ante, vol. v. 610.

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Upon the plaintiff's appeal from the decree at the Rolls the decree was reversed; and an account was directed of the consideration paid by the original grantee of the annuity, with interest at 5*l.* per cent. and of the payments of the annuity to the grantee, or any persons claiming under him by assignment or otherwise, to be applied in discharge of the interest and principal of the consideration; and if the consideration with interest shall appear to be fully repaid, or, if not, upon payment by the plaintiff of what shall be remaining due from him, the securities to be delivered up, &c. with costs; the Lord Chancellor's opinion being in favour of the jurisdiction; that the principle of the relief is not redemption, but the invalidity of the grant: and that the assignee, unless under special circumstances, is in the situation of the grantee.

THE plaintiff appealed from the decree (a) pronounced at the Rolls.

The petition stated, as the first ground of complaint, that the decree admitted the several deeds and instruments, for securing the said annuity of 100*l.* to be null and void; and therefore the petitioner ought to have the said deeds and instruments delivered up to him to be cancelled on payment of what, if any thing, should appear to be due from him in respect of the principal money advanced to him as the consideration of the said annuity, and of legal interest thereof from the time of such advance, after giving to the petitioner credit for the several payments made by him in respect of the said annuity since the granting thereof; whereas by the effect of the decree the defendant, *Arabella Holland*, is to be repaid the whole principal money advanced by her for the purchase of the annuity, with legal interest thereon from the time of filing the bill; deducting only such payments as have been made by the petitioner on account of the annuity since the filing of the bill; so that the petitioner is to have no credit in the account

(a) See the Report, *ante*, vol. v. p. 610.

{(1) Cited 1 Johns. Cha. Rep. 521.}

for the payments made by him on account of the annuity previous to the filing of the bill. 1802.

Secondly, the petitioner stated, that he was aggrieved by the decree, as he was thereby directed to pay all the defendants their costs of the suit. BROMLEY v. HOLLAND.

The Solicitor-General,(a) Mr. Piggott, and Mr. Leach, in support of the Petition of Appeal.—Upon the point of jurisdiction, a Court of Law has no authority to order the deeds to be delivered up, except in the four cases specified in the Act.(b) The plaintiff had no remedy any where but in this Court; the Court of King's Bench refusing to entertain his second application, either upon the former or any other ground. Another ground is, that *Oakden* is actually in the receipt of the rents and profits, to secure the other annuity to his brother; and the defendant *Holland* chose to take her annuity under him. It is impossible, therefore, to disentangle this property from the effect of that deed without the interposition of this Court; and the case is therefore much stronger than *Byne* v. *Vivian*,(c) and *Byne* v. *Potter*.(d) There was no consideration for that deed, the only transaction between the plaintiff and the assignee, except the forbearance of a demand, which could not be enforced at law. The assignee must be in the same situation as the original grantee. The ground of restoring the parties is, that the consideration has totally failed. The Court treats it as a loan, compelling repayment of the consideration with interest; and then it is impossible not to give the other party credit for the payments made on the other side. In the cases of usury, the Court restoring the money calls back the excess of the usurious payments beyond the legal interest. Who is the *particeps criminis* here? The enrolment was the duty of the grantee. The analogy between this case and *Howson* v. *Hancock*,(e) an action to recover money paid upon an unlawful wager fails. The same observation applies to the case of money paid upon an unstamped bill of exchange, also mentioned in the reasons alleged for this decree.(f) The bill is only evidence of the debt, which still remains in respect of the precedent consideration. The fraud is that of the debtor, the plaintiff. It is necessary to take some other medium as the ground of setting aside the transaction in these cases; considering it as a loan; and allowing the whole to be recovered back; which must proceed upon this, that the consideration has totally failed. [4] [5]

It is impossible, that this decree can stand upon the principle of redemption. The bill does not pray a redemption. There is no one instance, in which, if the deed has been declared void *ab initio*, the Court has done more than put the parties in the same situation as if it had never been executed. This decree, which must be considered as going upon the prin-

(a) The Hon. *S. Perceval.*
(b) Stat. 17 Geo. III. c. 26. s. 4.
(c) *Ante*, vol. v. 604.
(d) *Ante*, vol. v. 609.
(e) 8 *Term Rep.* 575.
(f) *Ante*, vol. v. 618.

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ciple, that the instrument is wholly void, gives it validity up to the time of filing the bill; which must have arisen from a confusion between a deed void and voidable, as by something affecting the conscience; upon which this Court has a discretion. What ground is there for favour to this defendant? Not as an annuitant, or assignee of an annuity. The subsequent deed, a mere direction of the mode of payment, is no confirmation; nor is a deed absolutely void capable of confirmation. The plaintiff does not seek to call payments back; but is content to take it, as it is, without account and without refunding. At all events the defendant *Holland* ought not to have her costs.

Mr. Mansfield, Mr. Richards, Mr. Romilly, and Mr. Cooper, for the Defendants, in support of the Decree.—As to the jurisdiction, though the defendants do not appeal, yet it is an answer to the plaintiff, complaining that he has not got enough, that he is entitled to nothing. The case is open to the defendants as to the whole, to the plaintiff only as to what is complained of by his petition.(a) No instance can be found, except those referred to in this judgment, in which a Court of equity has ever entertained such a jurisdiction, to deliver up instruments void at law. It was declined in *Franco* v. *Bolton*,(b) a decision much stronger; the instrument being void only by something *dehors*. It was exercised with great reluctance by Lord *Thurlow* in the case of the promissory note, *Ryan* v. *Mackmath*,(c) upon the principle, *quia timet*. Where there is a possibility of evidence being lost, so far it is rational. But this instrument is one, against which no evidence is wanted, and evidence is always in the power of the party, against whom an attempt may be made to enforce it. It cannot be enforced without a production of the memorial. *Byne* v. *Vivian*, and *Byne* v. *Potter* are not warranted by any previous decision. *Hart* v. *Lovelace*,(d) goes a step farther than the Court of King's Bench did in this case, viz. that even another Court cannot entertain jurisdiction, if it has been before Court of competent jurisdiction. In *Schumann* v. *Weatherhead*,(e) Lord *Kenyon* recognises his opinion in *Greathead* v. *Bromley*. It must be supposed, the Court of King's Bench refused to act under the judgment upon good grounds, and that the application was improper.

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Next, as to the terms, these payments are to be considered as payments of an annuity, which the grantor chooses to subsist, if he does not immediately state his objections to it. He chooses to let it continue at the risk of the grantee. Suppose it went on for forty years, so as infinitely to exceed the price, could he then bring back any thing so paid? By what action? The annuity is good, till set aside by him. If money has been voluntarily paid without any consideration, it cannot be got back again. Consider the consequence. The grantor will pay the annuity at the risk of the life dropping, till the purchase money is repaid; then make the objection; and say, the grantee

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(a) 1 *P. Will.* 299. (b) *Ante*, vol. iii. 368. (c) 3 *Bro. C. C.* 15.
(d) 6 *Term Rep.* 471. (e) 1 *East.* 537.

has received the purchase money. It is impossible to understand the principle, upon which the Courts of Law have gone upon this.(a) This is not the case of a loan; as the case of usury is from its nature. The cases of fraud, extortion, &c. have no resemblance to this. Consider it then as the case of an assignee, and under particular circumstances; which make it very different in a Court of equity. By the subsequent deed, the plaintiff tells her, it is a good annuity, and he means to pay it. The assignee, therefore, at least, if not the original grantee, is entitled to these terms. This in effect is calling back these payments, which could not be got from the defendant by action, if they are to be set against the money due to her in respect of the purchase of the annuity. The grantee lives up to his income under the impression, confirmed in this instance by the plaintiff, that the annuity is good. Consider the consequence of not only setting aside the annuity, but of calling back payments spent under that confidence. The Court, if it has jurisdiction, will at least compel the plaintiff to do equity. That is the principle, upon which the case of usury goes; though the transaction is void, as corrupt and against law. The plaintiff has by repeated acts, the deed of 1795, and his abortive attempts in the Court of King's Bench, given credit to this transaction. The plaintiff coming into equity for assistance, his own acts are very important as to the terms. It is impossible to reconcile the decrees in *Byne* v. *Vivian* and *Byne* v. *Potter*. Why did not the Court call back the money overpaid in the latter case as well as the former? This application is in nature of an action of assumpsit, to recover back [8] those payments. Money paid upon a respondentia bond, or the premium of a re-assurance, void under the Statutes,(a) cannot be recovered back, though the instrument is a nullity: *Andree* v. *Fletcher*,(b) *Munt* v. *Stokes*.(c) The principle is, that those payments were made according to good conscience; though they would not be enforced. Money paid upon an illegal contract, executory, has been recovered back: *Cotton* v. *Thurland*;(d) and the distinction is there taken between that case and this; in which the risk has been incurred, and in *Lowry* v. *Bourdieu*.(e) This is not fraud or surprise, but a defect in a collateral matter, merely form. At first it appears a fair proposition, to put the parties in the same situation: but in substance it is obtaining this relief against an assignee without repaying any thing, or repaying only a very small part of the sum originally advanced, in one way of taking the account. Offering to pay every thing, the plaintiff means to pay nothing; insisting, that the whole is satisfied. That distinguishes this from *Byne* v. *Vivian*; in which the party was, as in the case of usury, to be repaid the whole money advanced with interest. The deed is void, when the grantor chooses to insist upon the

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(a) See the note, *ante*, vol. v. p. 608.

(a) p. 8. Stat. 7 *Geo.* 1. *c.* 21. *s.* 2. Stat. 21 *Geo.* 3. *c.* 65. *s.* 29. Stat. 19 *Geo.* 2. c. 37. (b) 3 *Term Rep.* 266. (c) 2 *Term Rep* 561.

(d) 5 *Term Rep.* 405. (e) *Dougl.* 451.

1802. objection, and then only. The grantee could not say, it was void originally, and bring an action for the consideration. Lord *Alvanley* proceeded upon the ground, that, till the objection was insisted upon, the grant was good; considering it valid, as long as the plaintiff chooses, it should be so. In *Ex parte Maxwell*, (*f*) Lord *Kenyon* intimated a doubt, whether the analogy to the Statute of Limitations (*g*) might not be a defence against an application to set aside an annuity.

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[9] In such a case as this the decree is clearly right as to the costs.

The Solicitor-General, in Reply.—As to the question of the jurisdiction being still open, I admit, it would be an answer to the complaint, that the plaintiff has not sufficient relief, to show, that he is not entitled to any. *Byne* v. *Vivian* and the other case proceed upon this; that the existence of those instruments did to a certain degree affect the title, in the nature of a cloud upon it; which it was for the interest of the owner to have removed. In this case the party may reasonably apprehend, that if these securities are permitted to exist, they may be made available, not only at a subsequent period, but even now. The possible case of an action upon the suggestion, that the instrument is lost, occurs; the only answer to which is, that a bill to perpetuate testimony might be filed. That must be upon the principle, *quia timet*. The judgment is a subsisting security, which the plaintiff cannot prevent from being carried into effect against him. That requires no suit. How is the execution under it to be resisted? How is the grantor to know the difference between the deed and the memorial? The registry need not be made for several days.

With respect to the terms, certainly a great part of the argument in this decree applies equally to the grantee and the assignee. The principle of the relief is, that the whole transaction is void; and therefore the consideration has failed; which enables one party to maintain the equitable action for money had and received; and upon that principle the other has a right to set off these payments. They cannot be considered as voluntary payments. The payment of the consideration was equally voluntary. But in truth they are not so. This act certainly meant to give the same protection in this

[10] case, as the Court upon other principles does in other cases of oppression, usury, &c. In the case, put by your Lordship, of an acceptance for the honour of the drawer of a bill not stamped, he pays that money for that friend, just as if he paid it without accepting the bill. As to the case of hardship, the objection not being taken, till by the annual payments the principal and interest are paid, having the benefit of the risk all the time, the law gives that opportunity; but it cannot be presumed, that the party is cognizant of his right. These are mistaken payments, not voluntary payments, upon the consideration of the validity of the transaction. So upon the sup-

(*f*) 2 *East.* 85. (*g*) Stat. 21 *Jam.* 1. *c.* 16. *s.* 3.

position, that more has been paid than the principal and interest, the plaintiff does not ask any thing in respect of that. He will be contented, if the instruments are delivered up; and if they waive the account, he does not desire it. He will consent to take it as at the time of the assignment to *Mrs. Holland*, considering her as the original grantee. But upon principle it would be very difficult to stop there; for, the suit against the assignee is the same as against the grantee. The assignee is the purchaser of all the rights attaching upon the original grantee. With respect to the question, whether the excess beyond the principle and interest might not be recovered back, why should it not? It is part of that, the consideration for which has failed. The cases, where the contract is illegal, both parties knowing it, are distinct; not like this case, upon a law made for the benefit of the plaintiff; who is not to be considered *particeps criminis;* as he is in those cases; and cannot therefore set up the illegality of the contract: but the rule "*potior est conditio defendentis*" prevails. In the cases of insurance, if it fails on the ground, that the voyage never commenced, or a warranty of neutrality was not complied with, &c. the premium may be recovered back; which proves the distinction. Illegal contracts executory stand upon a very different ground. The party coming, before the contract is executed, disaffirms it. As to the case *Ex parte Maxwell*, the application was after the death of the party; and the Court refused to listen to it upon good grounds; that the testimony for defence against the application was gone. The allusion to the Statute of Limitations upon that occasion, is a mere dictum in support of that decision. Lord *Kenyon* could not mean, that an annuity paid for six years is therefore not to be shaken. If the original transaction was void, there might be a new agreement: but it cannot be the subject of confirmation; and in this instance the supposed confirmation is nothing more than directing the mode of payment; and no more a confirmation than every payment made under this grant. The plaintiff relies upon *Byne* v. *Vivian* and *Byne* v. *Potter*. As far as those cases agree, at least, the Court will extract the principle from them, as to the terms. At least as against *Mrs. Holland* the plaintiff ought not to be called on to pay costs: rather he is entitled to the costs; as the expense is incurred by her fault.

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The Lord CHANCELLOR, observing, that upon looking into the instruments it appeared, that the term was assigned to *Flashman*, and so the defendant *Tyrrell* had no estate in him, even apparently, which could call for him to be a party, and that *Flashman* was not before the Court, proceeded thus:

Defect of parties: defendant being liable to another suit.

As to the objection upon the want of parties it was said, that though *Tyrrell* assigned to *Flashman*, yet if the term is void, *Flashman* has not the legal estate in him. True; but if this bill can be supported upon the cases I shall allude to, the colour of title the deed furnishes, as throwing a cloud over

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I see from the report of this case, that Lord *Alvanley* in- [13] timated an opinion, (*a*) that he should have been justified in giving the account, not upon the foot of the assignment, but of the original consideration of 600*l.*; and I go along with him in that; for, if the Court has jurisdiction, for better and worse the assignee must stand in the place of the assignor. The party however appears to have been contented to have the account upon the footing of her own advance, and not to have pressed her equity to the extent, in which Lord *Alvanley* thought it might be granted. The petition of appeal complains, that the decree ought to be upon a different principle; and that the account should be taken upon this footing; that the original consideration should be taken as the principal to be paid, when the plaintiff comes into equity; not to redeem the annuity; for I cannot agree with Lord *Alvanley*, if that is the idea to be collected from the report, that it is a suit to redeem: but it is calling for a decree upon equitable grounds, if there are any such, in a case, in which the Court must state, that there never was a legally existing annuity to be redeemed;

(*a*) *Ante*, vol. v. 619, 620.

desiring, therefore, that he shall be considered as owing to those, from whom he received it, the sum of 600*l.* and paying interest for that sum from the time it was advanced; that an account should be taken, giving him credit, as matter of just allowance, for all the sums of money he had paid as annuity payments; and that, if the balance of the account so taken should be in favour of *Mrs. Holland*, it should be paid to her; and that upon the repayment the securities should be delivered up, and an injunction be granted against those, which cannot be delivered up; and if the balance should be against her, the bill does not contend, that the plaintiff can demand it in this suit. If the bill did contend, that she was to repay a balance due from her, it must be acknowledged there would be great difficulty in maintaining it; and that circumstance attaches considerable difficulty upon the question of equitable jurisdiction.

It did not occur to me, upon reading the Report, that Lord *Alvanley* collected from what passed before him, (and indeed it was from the accident of looking into the particular instrument that I collected it,) that *Tyrrell* had assigned the term. His Lordship considers throughout, that the legal estate, if any instrument passed it, was still in *Tyrrell*. [14]

The first question is as to the jurisdiction. If the Court has jurisdiction, the second question is, upon what terms this relief is to be granted to the present plaintiff.

Previously to the act this transaction among these parties would have been a perfectly legal, valid, transaction. That act, it seems admitted in the argument, has in this case produced this very singular state of circumstances; that it was admitted upon all hands, and it is impossible to deny, that this grant was originally good for nothing; and yet two applications to a Court having jurisdiction were unsuccessful. Upon the first of them relief was refused; which might very well be; for if the attention of the Court was not called to the circumstances forming the objection, or if it was called to them, and those circumstances were not matters within the contents of the deed, but matters of fact out of the deed, not sufficiently evidenced, or not by credible evidence, in such a case the Court could not exercise the jurisdiction. The second application was made upon a ground, which would have brought distinctly before the Court, according to the decisions upon this act, that within the contents and four corners of the deed there was an objection, viz. that there was no memorial of the clause of redemption; upon which the Court has frequently acted; and the Court held, that if one application had not succeeded, whether upon the same or different grounds, they would never entertain another application. It would ill become me to state any observation upon the wisdom, with which the Court so exercised their jurisdiction. But this difficulty occurs in this case; here is an instrument admitted to be null and void to all intents and purposes; and notwithstanding that the Court enforces the effect of it, whenever admitting a pro- [15]

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ceeding under the judgment, part of its own record; and this unseemly incongruity appears, that, if a question arose in any other Court upon the rights of the parties under these instruments, every other Court must say, the grantee has no right; and if the question was made, perhaps even upon the right to retain the money under the judgment, another Court, and perhaps that Court, would be under considerable difficulty to state, that the money was legally obtained, which had been obtained under a judgment, which this act pronounces null and void to all intents and purposes. Lord *Alvanley* thought, and I concur in that opinion, that, if this Court, independent of that objection, has jurisdiction, and is to give the relief, as it is contended it ought to be given in one way or the other, it was impossible, that the circumstances of this case with reference to the applications to the Court of King's Bench should destroy the relief, if it existed; and if the prayer of the bill can be maintained, either according to the plaintiff's principle or Lord *Alvanley's*, the want of success in those applications will not prevent the relief. Therefore I lay out of the case those applications, and also the circumstance, that Lord *Thurlow*, in one of the cases (a) mentioned in the argument, sent the point to the Court of Common Pleas, to be determined on a motion to set aside the warrant of attorney; 1st, on the ground that I should think it disrespectful to the Court of King's Bench to send it a third time; and, 2dly, that it is not necessarily part of my duty to send the parties to law upon a
[16] point, on which I have no doubt; for both as to the original consideration much might be said to draw into question the validity of the assignment; and the objection from the want of the clause of redemption in the memorial is now determined upon this act; and I do not like to disturb the determinations. These securities therefore are void at law; and in no shape ought to have execution at law.

The next consideration, if the securities are void at law, is, whether this Court has equitable jurisdiction to order these void securities to be delivered up. If that was *res integra*, my mind would be considerably affected by the very able argument addressed to the Court by *Mr. Mansfield* in *Byne* v. *Vivian*. But I am to consider the question, not merely with reference to the principle, upon which I should have been called on to decide that question if it had been originally before me, but regard being had to this fact, not immaterial, that the question appears (a) to have been three times decided by Lord *Rosslyn:* and the authority of the two first of these decisions is to this extent adopted by Lord *Alvanley;* that after those two decisions he would not repel the claim of equitable jurisdiction, but would adopt that idea. The question therefore comes before me with this sort of weight upon that side of the

(a) *Davidson* v. *Lord Foley*, 3 *Bro. C. C.* 598. 2 *Hen. Black.* 12.

(a) p. 16. See the references in the former report of this case, *ante*, vol. v. 610.

argument, contending for the jurisdiction, that it has been four times so decided, and three times in cases from which there is no appeal. If the case was to be decided unprejudiced by these circumstances, it would be necessary first to see, what is the object of the act, what is the policy of it; in what relation the parties stand with respect to those principles, upon which the Court, in other cases, has considered one party to the transaction, as a party whose interests are to be surrounded by the provident provision of the policy of the law.

In the preamble of this act, the Legislature declares the practice of raising money in this way pernicious; and it is impossible to read the enacting part without observing, that the mischief it describes is not to the public interests; but attaching upon individuals meant to be protected by the act. The effect of the secrecy of these transactions in promoting the practice is observed; and the means of preventing that secrecy are stated. I am not at liberty to examine, whether these provisions are wise or sufficient. The occasion does not call upon me to examine, how far they are clearly intelligible. But I am bound to hold, upon the clearest principle, that the provision, which the Legislature has said shall obtain to prevent that secrecy, is one that I must deem wise and necessary for the sake of the grantor, to prevent its being valid to any intent or purpose. I state it thus, because, when the argument takes the shape, as *Mr. Mansfield* put it very strongly both in those former cases and in this, that this is not a case of circumvention, imposition, furnishing any of the grounds of policy or attention to distress, I doubt, whether that argument is as clearly admissible as it was strongly put; for when the Legislature says, it takes the case of persons buying annuities as persons to be protected, and points out the species of protection, the Court is obliged to look at them as not protected to the extent, if not protected by the means the Legislature has positively required to be applied to their protection. If, therefore, this was unprejudiced by decision, this case as to the claim of the individual is not to be decided upon the circumstances existing merely between these individuals; but the party must have the benefit of those principles, upon which the Law has said, in every case, except those excepted, the individual, who the act supposes would not deal, unless driven by hard circumstances, shall have that protection, which the act requires. The decision must be not upon the honesty of the particular case, but upon the point, whether the individual dealing for an annuity has that protection, which the law has said in every case such a person should have. If that is dispensed with on account of the morality of one case, *pro tanto* the law is repealed.

[17] [18]

This act *(a)* has specified certain cases, in which by the exercise of a summary jurisdiction at law, the instrument so rendered void to all intents and purposes may be delivered up.

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The act was a very favourite act when it passed. I have often thought it as liable to objection upon this ground as any other: that it is not consistent with the policy of the law or the constitution, that this summary jurisdiction over property should be given in any case. I doubt whether that is not the greatest mischief. Applications were very frequently made and granted at law in cases, in which the Court had no authority. It occurred first to Lord Chief Justice *Eyre*, when in the Court of Exchequer, that they had no such authority: and that practice was corrected. In cases, therefore, where the express letter of the act does not give the Courts of Law authority to deliver up the instruments, it remains clear, that they never can be delivered up unless this Court has jurisdiction to order it. That reduces the question to this, whether the act of Parliament cutting up a transaction previously valid, and rendering it invalid to all intents and purposes, and providing itself the remedies parties are to have in consequence of it, this Court has inherent in its jurisdiction a right to do more by way of remedy to the party claiming relief, a right to give relief beyond what the Parliament has given. That would be a very grave question, if *res integra;* and I should have considerable doubt upon it: but the inclination of my opinion would be, that this Court would have that jurisdiction. In my experience in this Court there have been a great number of decisions upon notes of hand, bonds, &c.; and some degree of contradiction is to be found, not only in the argument at the Bar, but in what has fallen from the Bench, upon the authority of the Court to direct these instruments to be delivered up. (1) If in *Franco* v. *Bolton (a)* Lord *Rosslyn* is supposed to have been of opinion, that, upon the ground merely, that by the alteration in the law of pleading an action cannot be maintained upon an instrument in consequence of the present doctrine, that you may by pleading show the consideration, this Court would not order the instrument to be delivered up, I have great hesitation in acceding to that. But by the Report that does not appear to have been the only ground; the discovery sought tending to bring imputations upon the moral character of the plaintiff. I cannot however say the decision did not proceed in some degree upon the former ground; and in that extent I do not merely hesitate, but I really do not concur.

Courts of Law have no authority to order instruments void under the Annuity Act to be delivered up, farther than the act expressly gives it.

[19]

In the case of *Hanington* v. *Du Chatel, (b)* where Lord *Thurlow* granted an Injunction against a bond for the purchase of an office, taking notice of the alteration of the Law of Pleading he is made to intimate, that the jurisdiction of this Court might not be necessary, if the defence could be made at law. That I take to be a mistake; for I am quite sure, Lord *Thurlow's* opinion was, that Courts of Law, properly if you please, taking upon themselves to do that by new

The ancient jurisdiction of this Court not destroyed by the assumed jurisdiction of Courts of law, dispensing with *profert*, and permitting averment of a consideration not in the deed.

(a) *Ante*, vol. iii. 368. (b) 1 *Bro. C. C.* 124.

{(1) *Hamilton* v. *Cummins*, 1 Johns. Ch. Rep. 517.}

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forms of pleading, which they had never before done, as dispensing with *profert*, or permitting the averment of a consideration not in the body of the deed, could not destroy the ancient jurisdiction of this Court in matters of that nature. That unquestionably *was his opinion. (*a*) Unless it can be contended, that the jurisdiction is gone in the case of *profert*, why is it in this case? Clearly it is not gone in that; for the protection this Court gives in that case is most essential to the interests of justice. Here the party pledges his conscience by his oath, that the instrument is lost. The plaintiff at law may himself put it in the fire, and may be wicked enough to procure evidence to support that, if he is wicked enough to destroy the instrument. After the judgment and execution it might be brought forward again, if it was only concealed; and then the party, who had received the money, might be out of the jurisdiction. It is impossible therefore to say, the jurisdiction of this Court, protecting the subject so much farther than he can be protected at law, is destroyed; and these cases of annuities particularly may afford an intimation, why it is necessary to support the jurisdiction of this Court. Suppose a man throws his annuity deed into the fire, and gives evidence of the contents. The memorial would be strong evidence of the existence of the deed: but he might recover nothing, if the deed was produced, and differed from the memorial; and if it was not produced, he might recover the whole. (*b*) In this instance the clause of redemption is not in the memorial; in which case the recovery would be against Law, if the whole evidence appeared. This case contains a stronger ground for upholding the jurisdiction than perhaps existed in *Franco* v. *Bolton*: but it is enough to say, it is not possible to maintain, that the ancient jurisdiction is destroyed by the Courts of Law for the first time taking cognizance of that subject. So upon bills to have promissory notes delivered up in complicated cases, and as the evidence may be lost; and so upon bills to have void policies of insurance delivered up; which in the cases in the Court of Exchequer is always prayed, and which may be, though they are not usually, followed up to a decree, upon this principle; that it is not unwholesome, that an instrument should be delivered up, upon which a demand may be vexatiously made as often as the purpose of vexation may urge the party to make it.

[*20]

[21]

Another circumstance is to be observed in this case, as it was discussed at the Rolls: that, whatever may be said upon the cases, to which I have alluded, and whatever difference of decision there may have been upon such cases, it seems to me, there is considerable difference between the case of a Bill of Exchange, upon which on the face of it there can be no demand, and an instrument which, upon the face of it, purports to affect real property; and that is to be applied in

(*a*) *Atkinson* v. *Leonard*, 3 *Bro. C. C.* 218.
(*b*) *Ante*, vol. vi. 812, 813, and the references in the notes.

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some measure to the case of the bill without a stamp, that has been noticed. In *Byne* v. *Vivian*, and *Byne* v. *Potter*, the late Attorney-General lays particular stress upon the circumstance, that the instrument purports to affect real estate, and form a cloud upon the title. It is said in answer to the objection, that in this instance the jurisdiction of equity is as little wanting as in any; for the demand must be made upon the production of the instrument; and the memorial must be also produced, and if that is produced, the demand can never be finally supported. The answer to that is, first, that the demand may be as frequently made as vexation may dispose the party to make it: next, where the instrument purports to affect real estate, it is not just to consider it merely having regard to the question, whether the demand can be directly founded upon it; for an instrument, which apparently, though not really, (which must be shown by circumstances, *dehors*,) creates an encumbrance, may by being produced defeat the ends of justice. Suppose this plaintiff, instead of a rectory,
[22] was owner of a life estate in common lay property, and brought an ejectment, and this deed creating the term was produced by surprise, and, as in many instances that may be supposed, was not met by the material evidence: a dishonest use might be made of it, to prevent a recovery according to the right. I do not go the length, that if it is clear, that no use can be made of the instrument, that is ground enough for the equitable jurisdiction to take it out of the possession of the party, who can make no use of it beneficial to himself: but if a use may be made of it prejudicial to another, I should have an inclination to support the jurisdiction, to tranfer the possession of it from him, to whom it could be of no use, to him, to whom it might be useful, and in whose possession it would be prejudicial to no one. I do not say, this would not have left great doubt upon my mind: but it gives me an inclination of opinion, aiding to this conclusion, that after repeated decisions by Lord *Rosslyn*, adopted and applied by Lord *Alvanley*, considering himself bound to follow those decisions, it is too much for me to say, the Court has no jurisdiction, and to reverse all these decisions, where there is so much colourable ground to support them. It is more fit, they should meet their reversal elsewhere. The policy of this act also is not to be disregarded in a question, whether the Court ought to take jurisdiction upon the point, whether the deed ought to be delivered up: the Court having in many instances jurisdiction to have deeds delivered up on grounds of policy in cases, where an act of parliament has not authorized Courts of Law to compel it.

Upon the next question, if it was *res integra*, I should entertain great doubt both upon the decisions of Lord *Rosslyn* and Lord *Alvanley*. I was always struck with the difficulty upon this; whether it is consistent with the conduct of a moral man to take his chance; paying the annuity as long as he
[23] thinks it beneficial; and when he finds it so no longer, turning

mand, and saying he has done all a man looking attentively to his own interest can; and that he is acting legally; insisting in a court of justice, that what he has paid so long as annuity, he will not consider so, but as part of the consideration repaid. Upon the maxim "*Quod dubitas ne feceris*," I never could have made such a demand. But deciding upon civil rights, I have nothing to do with the morality. The grantee is left for a number of years in this situation. If he dies at the end of the first year, and as long as it is in his favour, the grantor will make no complaint; and will think it just to avail himself of it. When the lapse of time turns the advantage the other way, he then represents, that there is no annuity; and though the payments were made for many years as annuity, he will then treat them as consideration money. I remember, when the idea, that it could be so considered, had not been adopted at law; for though Lord *Rosslyn* in *Byne* v. *Vivian* says, there are several cases, no such case can be found; and Lord *Kenyon's* original decisions took the other turn, upon the sound principle, that a payment voluntarily made is not to be recovered back. But I must decide this upon the weight of authority, as to be applied at this day; and the Courts of Law now unquestionably hold, that the consideration may be recovered back; and have been in the habit of allowing payments made as annuity to be deducted. The party can therefore recover only the balance of a fair account; considering the sums paid as annuity, as paid in part discharge of the consideration. This is decided at law; and it is purely a legal question. There is no equity in it. But it is also decided in equity in *Byne* v. *Vivian*, *Byne* v. *Potter*, and the case (a) as to the insurance; in all which Lord *Rosslyn* was of opinion, that was the rule of equity; first, thinking, it should be so; secondly, that it was necessary, if that was the rule at law. Lord *Alvanley* also seems to be of that opinion; but taking the commencement of the account from a different period from that, to which the general rule of accounting would have referred; and upon the consent of the parties, as it seems, he took that different date, from which the account was to begin. His lordship's authority certainly is thus far prejudiced; that he seems to have framed his decision upon some notion, in which, speaking with great deference, a deference peculiarly due to him, as a Judge, who never determined without the most anxious consideration, I cannot follow him. He determined upon a ground, which rather supposes the deed good than void; for how can it be upon a principle of redemption, founded upon a clause of redemption in a deed invalid to all intents and purposes?

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Annuity void under the act: at law the balance of the consideration may be recovered, deducting the payments under the annuity.

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The question then is, what relief ought to be given if *Mrs. Holland* was the original grantee. Considering her so, if there is an original jurisdiction to order the instruments to be delivered up, and if I am to take the rule of accounting at law,

(a) *Ex parte Shaw*, *ante*, vol. v. 620.

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Annuity void under the act, upon an account of the consideration and the payments under the annuity, if the balance is against the grantee, it has been decided in equity, that it cannot be recovered.

(and I think it a pure question of law,) the rule is properly applied in *Byne* v. *Vivian*. There is a difficulty, I admit, as to what is to be done with any surplus in the hands of the grantee. If it is money paid without consideration, yet, if voluntarily paid, it cannot be recovered back. If that is so, it must be upon some principle arising out of the policy of the act. If there is no principle of that kind meeting it, it is a little difficult upon strict legal principles to say, what is the discriminating circumstance, giving the power of recovering in one case, and precluding it in the other. But that difficulty is met by decision, for though the case has not occurred at law, it has in equity. In *Byne* v. *Potter* there was a surplus in the hands of the grantee; and the Court did not meddle with it; but proceeded upon the declaration, that the * defendant had received more than was due. I do not understand the legal principle: but that sort of decree was obtained in that case.

[* 25]

Then does the case of the assignee differ? I am clearly of opinion, Lord *Alvanley* was right in thinking the original consideration is the ground. But the principle is, that the assignee stands in the place of the grantee, if there is nothing to create a case of bad faith. As claiming the annuity the assignee is no more than a person having an equitable title in many of the securities, forming the remedies, as assignee of the bond, judgment, covenant: a mere equitable title. It is true, the legal estate is in the trustee for the benefit of the assignee: but that is only one remedy; and all the grantee can assign, is the right he has. If *Mrs. Holland* goes for execution of the judgment at law, it must be in the name of *Greathead;* so in this Court to have any proceeding directed upon the bond: so at law to have any proceeding upon the covenant. It is impossible to maintain, that there is any substantial difference between the grantee and the assignee. The case would be widely varied, if by a transaction contemporaneous with the assignment the grantor puts himself in a situation, in which the assignee might impute to him bad faith, that the grantee could not. Then the case of the assignee stands upon principles not applying to the grantee, and furnished by the subsequent conduct of the grantor. It is impossible, in this case, that *Mrs. Holland* can impute bad faith at the time of the assignment. She may say, there were two unsuccessful applications to the Court of King's Bench. But the question of bad faith arises upon an instrument executed several months after the assignment. Put it another way. If the assignee is not to stand in the place of the grantee, what is the equity? It will not be said, the equity, by which the grantor is to be governed, is the consideration between the grantee and the assignee at the assignment. That cannot be; for a case may happen of an infirm habit, a life at the market price (a) not worth five years purchase; who afterwards be-

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(a) See the observations of the Lord Chancellor, as to the Market Price of Annuities, *ante*, vol. vi. 274, in *Gibson* v. *Jeyes*.

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comes a strong man; and could not get an annuity upon the same terms. That annuity might at the end of five years sell for a great deal more than it was originally granted for; and in fact these persons frequently give more for the assignment than for the grant. If previously to the assignment the grantor had an equity, is that to be disturbed by a transaction to which he is no party? To put another case. Suppose, instead of being enjoyed many years, the annuity was sold within two years for 200*l.*; the grantee disliking his bargain: could the grantor have insisted upon taking the account, considering it as granted at 200*l.* only; or must he not have taken the account upon the original sum? Then must it not follow, that where the grantee gives less than he received, the account must be taken upon the same footing? Suppose a third application made to the Court of King's Bench with success; must not the account be taken as between the grantor and grantee? Standing in the place of the grantee, she must admit the principle against as well as for her.

In the confirmation there is nothing, that bears upon this; for all the defects of the memorial were not known. The bargain of *Mrs. Holland* was made before the confirmation; and it is difficult to say, how a void instrument can be confirmed. A case of bad faith therefore does not arise by that transaction. I am clearly of opinion, it is impossible to give the account, upon any principle, afforded by the terms of a deed void to all intents and purposes. I am also clearly of opinion, that this is not a case of the redemption of an annuity, [27] but a case, in which it is asserted, that there never was an annuity to be redeemed; and it is contended, that upon doing certain equities these instruments ought to be declared void; not giving a right to say, there was an annuity; but giving a colour for such assertion. I cannot, giving judgment upon the jurisdiction at this day, and considering all that has passed, say, the Court has no jurisdiction. If the Court has jurisdiction, with all deference and respect my clear opinion is, that the decision in this cause has mistaken the principle, upon which it is to be exercised in the mode of accounting. I put myself upon the fact of decision as to the mode of accounting at law, doubting the principle: but after those decisions the grantee coming for the consideration, the grantor may say, he shall allow the payments, since the transaction took place; and I am of opinion, it is reasonably clear, the assignee, if there is nothing more in the case than an assignment, stands precisely in the place of the grantee; and in many cases it is for the interest of the grantor to hold that doctrine.

As to the costs, it is not possible to avoid giving *Tyrrell* his costs; for he was brought here quite unnecessarily; and though he has joined in a long answer, with which he has nothing to do, he has not burthened the suit in point of expense. *Mrs. Holland* must have brought the same matter upon the record. With respect to the costs of the suit, in *Byne* v. *Vivian*, Lord

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Rosslyn gave the defendant his costs. In *Byne* v. *Potter*, where the annuity had been satisfied, he made the defendant pay the costs. In the former case the bill was brought not for redemption of the annuity, but for relief, asserting, that no annuity ever existed. Upon redemption the costs are given: but I do not see how the rule in that case is necessarily applied to a case, where the bill is not brought for redemption. In the case of usury I do not know that the defendant is to have his costs,
[28] because he would in a case of a fair mortgage. The costs in *Byne* v. *Potter* did not, I apprehend, turn upon the surplus in the defendant's hands: but he had been the attorney of the parties; and I understand it turned upon some principle founded upon that. In this instance the party does not come for a redemption: therefore *primâ facie* he is not within the rule that he is to pay costs. As to his receiving them, first, I am reversing a judgment obtained very much in favour of the defendant. I cannot say, attending to that circumstance, she had so little reason to oppose the relief in the extent, in which it was prayed, that the plaintiff is to have the costs; and that circumstance alone would lead me to say, I would not give this relief with costs. But another ground is decisive; that, when such a transaction comes almost for the first time, and the defendant can set up arguments with so much of difficulty and principle upon the right to exercise the jurisdiction, and the principles, upon which the Court ought to give the account, it is a great deal too much to give the costs, which are entirely in the sound discretion of the Court, against a defendant, submitting her right upon such principles, as in the present instance. The relief therefore must be given without costs. *Oakden* must have his costs; and that is material with respect to the question of jurisdiction; for he is in receipt of the rents and profits, not by virtue of any assignment, but by virtue of a power of attorney, which is a revocable instrument; and in ordinary cases would not found the jurisdiction of this Court. But where it is executed for valuable consideration, this Court would not permit it to be revoked; and he is in possession, to receive, not merely for *Mrs. Holland*, but for others, upon valuable consideration, to whose securities there is no objection. His right on behalf of the other annuitants will secure to him the receipt of the whole; and this annuity not being valid, he must account for a part to the plaintiff. The account therefore against him would secure the jurisdiction.

Power of attorney revocable, and in ordinary cases would not found the jurisdiction for delivering up instruments; but when executed for valuable consideration this Court would not permit it to be revoked. (1)

[*29] *The decree declared, that the decree bearing date the 4th of *July*, 1800, be reversed; and directed an account of the consideration, or considerations, paid by *Samuel Greathead* on the purchase of the annuity or annuities granted to him by the plaintiff, by the deed, or deeds, bearing date the 16th of *May*, 1788, together with interest at 5 *per cent. per annum* upon the same; and also an account of the payments made by the plain-

{(1) See 1 *Caines' Ca.* 15. 17.}

tiff, or on his behalf, upon account of such annuity or annuities to the said *Samuel Greathead*, or to the order, or upon the account, of any person or persons claiming under him by assignment or otherwise, including the defendant *Arabella Holland;* and directed that such payments, as the same were made from time to time, be applied first in discharge of the interest, and then of the principal of such consideration or considerations; and in case upon the taking of such account such consideration or considerations with interest shall appear to have been fully repaid, that all deeds granted for securing the said annuity or annuities, other than the deed of the 1st of *June*, 1795, be delivered up to be cancelled; and that satisfaction be entered upon the record of the judgment; and that the defendant *Richard Oakden* is without costs to account with the plaintiff for, and to pay to him, the surplus rents of the premises comprised in the deed of the 1st of *June*, 1795, after satisfaction of the payments, other than those thereby directed to be made to the defendant *Arabella Holland:* such surplus rents to be accounted for by the defendant *Richard Oakden* from the time from which it shall appear such principal and interest, as aforesaid, was satisfied, as aforesaid, and from which it shall appear, that he shall have had notice of the plaintiff's claim; but not beyond the time of filing the bill; and in case any thing, on taking such account as aforesaid, shall appear to be remaining due from the plaintiff, then the plaintiff is to pay the same [30] to the defendant *Arabella Holland*, as and when the Master shall appoint; and upon such payments such deeds shall be delivered up, and such satisfaction be entered, and such payment be thenceforth made by the defendant *Richard Oakden*, as hereinbefore mentioned; and in case the plaintiff shall make default in such payments, the bill is to be dismissed with costs, to be taxed, and paid to the defendant *Arabella Holland;* and in either case the plaintiff is to pay the defendants *Tyrrell* and *Oakden* their costs of the suit; and until such accounts are taken, and, if any thing shall appear to be due thereon to the defendant *Arabella Holland*, until such default of payment as aforesaid, all proceedings at law by the defendant *Arabella Holland*, either in her own name or in the name of any other person or persons, under whom she claims, are to be staid by injunction.

1802.

1800. *Nov.* 21.
1801. *Feb.* 19.
July 24.
1802. *May* 7.

WHITE *v.* DAMON.

Bill for specific performance of a purchase by auction dismissed by Lord *Rosslyn* with costs, merely as being a bad bargain from inadequacy of value. (1) Upon a rehearing Lord *Eldon* was of opinion, that was not a sufficient ground for refusing a specific performance of a purchase by auction without something more, as fraud or surprise, &c. But the decree was not affected upon another ground; that a material witness being incompetent, the bill was not supported by evidence.

ESTATES, situated at *Gosport*, in *Hampshire*, of which the defendant *Damon* was seised in fee, were put up to sale by auction, at *Gosport*, in fifteen lots; all of which were sold except Lot 3, consisting of a wharf and premises. For that lot there were no bidders. The deposits upon the other lots were paid to *Smith*, the auctioneer, amounting to 653*l.* 6*s.* 6*d.* *Damon* afterwards borrowed from *Smith* 1000*l.*; the balance at that time in *Smith's* hands on account of the deposits being 521*l.* 6*s.* 2*d.*; and as a security for the repayment it was agreed, that Lot 3 should be conveyed to * *Smith*, in trust to sell; and accordingly a conveyance, dated the 23d and 24th of *November*, 1796, of the whole estate to *Smith*, was executed, upon trust to convey to the purchasers the lots sold; and, as to Lot 3, upon trust to sell after the 11th of *March* next; and *Damon* covenanted to join in the sale: but it was declared, that was not to be considered necessary. On the 24th of *November*, 1797, the money not being paid to *Smith* at the time limited, the premises comprised in Lot 3 were sold by auction by *Smith* at *Garraway's*, and bought for 1120*l.* by *White*; who paid a deposit of 20*l. per cent.*

The bill was filed by *White* against *Damon* and *Smith*, for a specific performance of the contract.

The defendant *Damon* by his answer submitted, that the sum of 1120*l.* being a grossly inadequate price for this estate, a specific performance ought not to be decreed. Upon the answer and the evidence it appeared, that the rent of these premises was 260*l.* and the value 2200*l.*

In support of the bill, *Smith* proved the circumstances under which the sale took place; that it was a fair sale by auction; that he had given notice to the defendant by letter of the intention to sell at *Garraway's*; to which no answer was received. [* 31] The whole case, as to the circumstances under which the sale took place, rested on his evidence.

Mr. Richards, and Mr. Benyon, for the Plaintiff, insisted, that as there was nothing to impeach this sale, it must be established.

Mr. Mansfield, and Mr. Cooke, for the Defendant.—This Court will not enforce a sale under such circumstances, and at only half the value; but will leave the parties to law. Though [32] certainly there is no proof of actual fraud, yet the price being so grossly inadequate, not five years purchase, there is ground for suspicion; but whether it is from fraud, accident, or mere negligence, a Court of Equity ought not to compel execution of a contract so enormously to the advantage of one party.

{(1) See *Butler* v. *Haskell*, 4 Desaus. Cha. Rep. 639. *January et al.* v. *Martin*, 1 Bibb's Rep. 687. *Osgood* v. *Franklin*, 2 Johns. Cha. Rep. 586.}
Rep. 23. *Gregor* v. *Duncan*, 2 Desaus. Cha.

The proposition must be, that if the property is sold at any price, unless actual fraud appears, this Court is to enforce the agreement. The general rule of this Court is not to enforce a hard agreement. The distinction, as it was taken by Lord Chief Justice *Eyre*, is, that inadequacy of price is not of itself a sufficient ground for rescinding a contract, *Griffith* v. *Spratley*.(a) The circumstance, that the sale was by auction, makes no difference. The foundation of the rule is, that the agreement is unreasonable; and upon this subject the Court has a discretionary jurisdiction. The sale was not with the consent of the defendant. These premises ought not to have been sold at *Garraway's*. No instance can be produced, in which, where it was manifest, the property was sold at considerably less than the real value, this Court has enforced the contract and compelled a conveyance.

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Mr. Richards, in Reply.—Supposing the price to be under the value, a great deal more is necessary to prevent this relief, as influence, &c. Without some ground of that sort there is no instance of impeaching a sale by auction. If this doctrine is applied to a sale by auction, the case will be new. The defendant did not forbid the sale at *Garraway's*. He did not attend, or take any measures to prevent the property going at less than the value. He lay by, and suffered the plaintiff to consider it as his own. There is not an instance of impeaching such a sale on the mere ground of under-value. The property is carried to a public market: each party has a right to bid. There are modes of preventing the property [33] from going under its value.(a) The vendor may have his friends to bid. It is held out that the party may purchase with safety, if he shall be the highest bidder. The stipulation with the public is, that the highest bidder shall have it. Where is the Court to stop? No fraud is imputed: no sort of misrepresentation: no surprise; as in *Twining* v. *Morrice*;(b) which case is supposed to have gone a great way: nothing but inequality of price. All the cases, such as *Heathcote* v. *Paignon*,(c) where a contract upon a very small consideration has been impeached, have contained some other ingredient, as infirmity of mind, &c.

Lord CHANCELLOR.(1)—This bill is filed for a specific performance of an agreement for the sale of a freehold estate, described as Lot 3, consisting of a wharf and other premises at *Gosport*. The facts are very short. This lot was put up, together with other lots, part of the same estate, at *Gosport*. There was no bidder for that lot. There were bidders for all the other lots. After the sale, *Smith*, the auctioneer, advanced 1000*l.* to the vendor, with great security; for he had all the

1801. *Feb.* 19.

(a) In the Court of Exchequer, 2 *Bro. C. C.* 179, note.
(a) p. 33 See *Conolly* v. *Parsons*, *ante*, vol. iii. 625, note.
(b) 2 *Bro. C. C.* 326. (c) 1 *Bro. C. C.* 1.

{(1) Lord *Rosslyn*.}

1802. WHITE v. DAMON.

deposits; and the money was to be paid into his hands for all the other lots: so that, except the temporary accommodation, the vendor, whom *Smith* knew to be a distressed man, forced to sell, had no other benefit by that advance. The auctioneer however, chose to take a better security than that he would have had as auctioneer; and he chose to take as an additional security a conveyance of this lot, with a power to sell; and his receipt to be a discharge for the price. The manner in which he proceeded, was, after having received a considera-
[34] ble part of the money upon the other lots, in 1797, exactly a year, he puts up this wharf and premises, situated at *Gosport*, to sale at *Garraway's*, certainly not without the knowledge, but certainly without the consent, of the owner. The place of sale was not very proper; and the time was very rapid. The premises were bought for 1120*l.*; and the bill is filed by the purchaser. It appears in proof, and very distinctly, that the value of the premises is above 2000*l.*; and that they are in a condition to be let upon a lease for 200*l.* a year. I have nothing to do with this case in a Court of Equity. I do not hold, that the Court is bound in all cases to carry an agreement into execution; but may leave the parties to an action. But the plaintiff has got all he had a title to expect. He has a covenant from *Damon* to join in the sale. I shall leave him to his action of covenant. If he does not bring his action of covenant within a certain time, the bill must be dismissed with costs.

The counsel for the defendant pressing for an immediate dismissal, the bill was dismissed, with costs as against *Damon*, and without costs as against *Smith*.

1801. *July* 24. A petition of re-hearing was presented by the plaintiff; and the cause being re-argued before Lord *Eldon*, Chancellor, stood over several times: his Lordship expressing great doubt as to the principle of the decree; and also, whether *Smith's* evidence could be admitted.

1802. *May* 7. *Lord* CHANCELLOR.—I do not think it possible to touch the decree that has been made in this cause. If the case had stood before me as upon the transactions of the auction, and
[35] the value of the property, as it was taken, till the difficulty arose as to *Smith's* evidence, I should have hesitated before I should have decided, that the difference of the value would be a sufficient ground for dismissing the bill. It is a case of great consequence, and was much considered by Lord *Rosslyn*; and some points of view, in which it has struck me, seem to have escaped his Lordship's attention; or were not thought worthy of it. The plaintiff is not affected with any thing beyond suspicion: the sale taking place at an auction, without any fraud, surprise or mistake; the estate being offered upon any price he would bid; and without more he became the purchaser. I am inclined to say, that a sale by auction, no fraud,

surprise, &c. cannot be set aside for mere inadequacy of price. (a) It will be very difficult to sustain sales by auction, if this Court will not specifically perform the agreement. I agree with Lord *Rosslyn*, that giving a specific performance is matter of discretion; but that is not an arbitrary, capricious, discretion. It must be regulated upon grounds, that will make it judicial.

1802. WHITE v. DAMON. Specific performance matter of discretion, not arbitrary, but judicial. (1)

But upon looking through the bill, answer, and evidence, it appears, *Smith* has been examined; who under the circumstances clearly cannot be a witness; and he alone proves any one of the transactions, upon which the plaintiff must proceed. Except his evidence there is no proof of the sale, of the biddings, of any of these circumstances; and the answer does not admit any one of them. It does not deny them. The deeds and the value are proved by other witnesses. *Smith* was not merely an auctioneer. He was the vendor himself; and I think, he might have filed a bill against the purchaser and his author to have the whole contract made good. If his [36] evidence cannot be received, and I am clearly of opinion it cannot, many of the material facts, upon the proof of which the decree must proceed, are neither admitted, nor proved. The consequence is, the cause is brought to a hearing without evidence to maintain the bill.

(a) In *Ex parte Latham*, a bankrupt petition, *March* the 28th, 1803, the Lord Chancellor expressed the same opinion; and referred to this case.

MOGGRIDGE v. THACKWELL. (2)

1802 *Dec.* 14, 15, 16, 17. 1803. *May* 12. *Ante*.vol. i. 464.

Upon a rehearing of that part of the decree, which relates to the charity, the decree was affirmed: the Lord Chancellor collecting the result of the authorities; that, where there is a general, indefinite, purpose, not fixing itself upon any object, the disposition is in the King by sign manual; but where the execution is to be by a trustee, with general or some objects pointed out, there the Court will take the administration of the trust. The costs of all parties were given out of the fund as between attorney and client.

THIS cause, (a) had been brought on before Lord *Rosslyn* for further directions upon the Master's Report, approving a scheme for effectuating the purposes of the charity under Lord *Thurlow's* decree. Upon that occasion Lord *Rosslyn* intimated, that it was fit, that decree, as far as it respected the charitable disposition, should be re-heard. Upon that intimation a petition of re-hearing was presented by the next of kin; and upon that petition the cause was re-heard by Lord *Eldon*.

Ann Cam, by her will, dated the 16th of *June*, 1779, after giving directions concerning her funeral, desired *Mr. Edward Lawrence*, and any other friend her executors shall appoint, to attend her funeral; and for their trouble she gave to each of them so attending 10*l.* for mourning. She then gave to *Mr. Thackwell* and his heirs, certain estates; and reciting, that she was tenant in tail of the estates called *Hill Netherton*, and

(a) Reported, *ante*, vol. i. 464. 3 *Bro. C. C.* 517.

{(1) See *Turner* v. *Clay*, 3 Bibb's Rep. 52. 2 Johns. Cha. Rep. 23.}

{(2) Cited 4 Wheaton. 45, and remarked upon by *Marshall*, C. J.}

1802. MOGGRIDGE v. THACKWELL. [*37] *Laycells*, and by suffering a recovery could make herself tenant in fee of them, but out of regard to her aunt *Walker* and her family she * chooses to let the estate tail continue, and the estates to go according to the present limitations, she gave some other estates in *London* to two persons and their heirs respectively; and all the rest of her real estates she gave to *Mr. John Moggridge*, of *Bradford* in the county of *Wilts*, and *Mr. James Vaston*, of *Clapton*, in the County of *Middlesex*, and their heirs, but chargeable with the payment of the several annuities following, for the respective lives of the several annuitants, payable half-yearly; viz. to *Elen Pheasant*, her late servant, fifteen pounds per year; and giving some other small annuities she directed, that, if any of the annuitants shall die before the expiration of the first six months after her death, and shall have lived over one quarter, or shall die in any after six months after the completion of a quarter, then that their respective executors or administrators, shall receive one quarter's annuity.

The testatrix then gave a great number of pecuniary legacies, to some of her next of kin and other persons; and among them gave 4000*l.* each to her cousins *Joseph Walker*, and the Reverend *William Walker;* and she gave 4000*l.* to *William Pollock* and *Peter Triquet;* in trust to lay it out in Government or real securities, and to change the same as they in their discretion shall think proper, and to pay the interest and dividends from time to time into the proper hands of her cousin *Elizabeth Camilla Tudor;* and her receipt alone to be a sufficient discharge to her said trustees; and she declared, that the said interest and dividends shall in no wise be subject to the debts, control or management of her husband; and after her decease the testatrix ordered her said trustees to pay so much of the interest and dividends of the said 4000*l.* for maintenance and education, as they shall think proper, and to pay the principal and accumulated interest to the children; and if
[*38] she should leave no child at her death, or any issuing therefrom, the testatrix gave 1000*l.* part of the said 4000*l.* to *Joseph Walker*, and the remaining 3000*l.* to *William Walker.* Among other legacies she ordered her executors to pay into the proper hands of *Mrs. Coley* for her sole and separate use 100*l.;* she gave to the parish of *Battersea* 50*l.;* to the parish of *Dymocke* 60*l.;* and to the parish of *St. Peter, Cornhill*, 30*l.* to be distributed among the poor thereof according to the discretion of her executors; and she gave to the respective trustees, guardians, or managers, lawfully appointed, of the Hospitals, Infirmaries, and Dispensaries, following, and to their respective executors and successors, the sums as follows; to the Asylum Hospital 500*l.:* to the Hospital for Lunatics in *Herefordshire*, 200*l.:* to the Gloucester Infirmary 200*l.:* to the London Infirmary 200*l.:* to the Lying-in-Hospital of the City of London 200*l.:* to the Humane Society 200*l.:* to the General Dispensary for the relief of the poor in *Aldersgate Street* 100*l.* Then after some further legacies, and specifically disposing of all he:

plate, watches, &c. wearing apparel and furniture, she concluded thus: 1802.

MOGGRIDGE v. THACKWELL.

"And I give all the rest and residue of my personal estate "unto *James Vaston*, of *Clapton*, *Middlesex*, gentleman, his executors and administrators; desiring him to dispose of the "same in such charities as he shall think fit, recommending "poor clergymen who have large families and good characters; "and I appoint the said *John* and *Mr. Vaston*, before-mentioned, executors of this my will; and I desire *Robert Woodford*, "of *Taplow*, *Bucks*, Esquire, and the aforesaid *Mr. Richard* "*Wicherley*, to aid and assist my executors."

The testatrix in her fourth codicil thus expressed herself:

"My will I shall order to be sent with this: but my executors need not hurry themselves in any shape, but take their "own time to do whatever must be done, and employ *Mr. Lawrence* or any other *Mr. Vaston* thinks more proper to do the "writing part of the business. I hope it will be quite unnecessary for my executors to come into the country, unless it is "their own choice." [39]

The decree, as it was finally pronounced by Lord *Thurlow*, upon a motion to vary the minutes, declared, that the residue of the testatrix's personal estate passed by her will; and ought to go and be applied in charity, regard being had to poor clergymen with good characters, and large families, according to the recommendation in the will; and that the Master should approve of a scheme to effectuate the purposes of the said charity; with liberty for the parties to lay proposals before him for that purpose.

The residue of the personal estate amounted to 50,000*l.*

By the scheme, submitted by the plaintiff, the executor, and the next of kin, and approved by the Master, it was proposed that the defendant *Thomas Walker*, first cousin and heir at law of the testatrix *Ex parte materna*, might be allowed out of the residue of the testatrix's personal estate the sum of 5000*l.* under the particular circumstances of his case; and that small annuities should be granted to several other persons; who were either relations of the testatrix or were in her life dependent on her bounty; that a school may be established at *Dymocke*, the residence of the testatrix and her family, for poor children of that parish; that 1000*l.* may be appropriated in aid of the Gloucester Infirmary; 1000*l.* in aid of an intended Lunatic Asylum at *Gloucester;* that 6000*l.* 3 *per cent.* Bank Annuities may be transferred, and the dividends appropriated to a charity instituted in aid of the distribution annually made for the relief of widows and orphans of clergymen in the diocese of *Gloucester*, to be applied for the relief of poor clergymen, who have large families and good characters, according to the rules of distribution of the said institution; and lastly, that the residue and remainder of the said funds and of all the testatrix's personal estate shall be called *Mrs. Ann Cam's* benefaction to poor clergymen; and shall be invested in the 3 *per cent.* Consolidated Bank Annuities, in the name of the [40]

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Governors of the Charity for the relief of poor widows and children of clergymen; and that the interest and dividends shall be applied by the said Governors in or towards the relief of poor clergymen with good characters and large families according to the recommendation in the will.

The report then stated the evidence in support of these proposals: As to *Thomas Walker* the affidavits stated, that he would have been entitled to the estates of *Hill Netherton*, and *Laycelles*, of the value of 12,000*l.* as heir of his mother, in case the testatrix had not barred the intail; deducing his title, and stating the clause in her will as to that; and that nevertheless long after making the will she suffered a recovery; that at various times she assisted him; and stating other circumstances, as evidence of her regard and intentions in his favour, particularly to leave him a sum of money in lieu of those estates shortly before she was seized with the illness, of which she died; and that he was a proper object to partake of the charitable fund.

Mr. Lloyd, Mr. Stanley, and Mr. Whishaw, for some of the next of kin; Mr. Mansfield, Mr. Richards, Mr. Romilly, Mr. [41] *Burton, and Mr. G. Wilson, for others of the next of kin, in support of the Petition of Re-hearing.*—This case stands very much independent of all the authorities, upon its own circumstances, and the terms of the residuary clause, and the whole frame of the will. This is not the simple case of a general indefinite trust for charity, without any object specified by the testatrix; but a personal confidence confined to *Vaston*, that cannot be transferred to any other person; and which the Court cannot possibly exercise. The question then is, whether in the event that has happened, there is a lapse for the next of kin; or whether it devolves to the Crown, as the general guardian of all charities. It is an admitted fact, that the testatrix knew of *Vaston's* death. The will contains a great number of charitable legacies, very accurately expressed. Every part of the will shows great care in the manner of expression. The word in the residuary clause is in the plural number "charities." Certainly no stress can be laid upon the word "recommend" alone: but though the rule is established, that, where the fund is certain, and the object certain, words of desire or of mere suggestion and intimation shall receive a monitory sense, and be held a trust; yet undoubtedly this word in its natural sense is not monitory, but a term of option; and where an intention of that sort appears, it would be a preposterous construction to force upon it the legal sense. The context affords the clue; and the expression, "as he shall think fit," decides, that an option was intended; distinguishing this case from *Wynne* v. *Hawkins*,(*a*) *Sprange* v. *Bernard*,(*b*) *Pushman* v. *Filliter*,(*c*) and *Bland* v. *Bland*, cited in all of them. *Vaston* might have given to any charity, or among all the charities in *London*, and in such proportions as he thought proper. He might have dis-

(*a*) 1 *Bro. C. C.* 179. (*b*) 2 *Bro. C. C.* 584. (*c*) *Ante*, vol. iii. 7.

posed of the fund by his will in that way; * and could not have been compelled to execute in favour of any particular charity, till he thought fit; for that would have been against this will. The will does not prescribe any particular instrument, by which, nor any particular period, at which, he is to execute. He had his whole life for that purpose; and if so, it must be a mere recommendation, and not a trust. Some difference in this respect appears between Lord *Thurlow's* judgment and his decree. The judgment seems to consider these words as monitory: the decree considers them as words of option; and that the Master is at liberty to receive any scheme, provided a charity for poor clergymen forms a part of it. It is then a decree for an indefinite charitable purpose; of which there is no one instance.

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It is clear, Lord *Thurlow's* opinion would have been different, if he had not considered himself bound down by authorities. If the Court is not absolutely bound, there is no reason to strain the construction in favour of such a disposition against the next of kin; many of whom are as much objects of charity as that alluded to by this will. The property amounts to 50,000*l.* The law of the country condemns such a disposition of real estate; and why should it prevail to such an extent as to personal property? Lord *Hardwicke* considered one object of the Statute (a) to be to prevent persons, who would not be charitable in their lives, from disappointing their poor relations. Lord *Northington* particularly, in *The Attorney-General* v. *Tyndall*, (b) and other great men, have stigmatized such dispositions, as partaking more of vanity than a charitable purpose. The question upon this is, whether the gift fails on account of the death of the trustee; or, whether the doctrine of *cy pres* takes place; and whether the Court sees its way sufficiently to effectuate what was the general intention. If the [43] trust is to be executed in this Court, it must be upon that notion. That doctrine was certainly extended by the old cases to a great latitude; and under the supposed general intention the thing most opposite to the particular intention, from which only the general intention was to be collected, was established. *The Attorney-General* v. *Syderfin*, (a) was determined long be-

(a) Stat. 9 *Geo.* 2. *c.* 36. (b) *Amb.* 614.

(a) p. 43. 1 *Vern.* 224.—*The Attorney-General, at the relation of the Governors of Christ's Hospital* v. *Robert Syderfin, Anne Syderfin, and others, Defendants.*—In Chancery, Reg. Lib. A. 340, 11th *February*, 1683.

The information was to be relieved touching the sum of 1000*l.* given to charitable uses by the will of *Thomas Syderfin;* setting forth, that the said *T. S.* late of the Middle Temple, being in his life-time seised in fee simple of divers messuages, lands, and tenements, in the counties of *Somerset* and *Surrey*, and possessed of a considerable personal estate, made his will, dated the 17th of *March*, 1678; and thereby devised and charged all his said messuages and lands for the payment of such debts as the personal estate of him the said *T S.* should fall short; and to pay 200*l.* per annum to his wife for her life; and thereby taking notice he had but one daughter living, made a provision for maintenance and a portion for her, to be paid at her age of twenty-one, and also for such other daughter or daughters as he might after have; and in case of no son, and his daughter or daughters should die, then he devised the premises in *Somersetshire* to the defendant, his brother, upon trust to pay the defendant *Anne*, his wife,

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fore this sort of disposition was condemned * even as to real estate, at a time, when this Court was in the habit of deciding monstrous propositions in favour of charity. The ground of

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1000*l* if then living, and 1000*l*. more to charitable uses as he had directed: and of his said will made the defendant *Anne* executrix.

That the said testator shortly after died, seised and possessed, as aforesaid; and that the defendant proved the will; and possessed herself of all the personal estate, sufficient to pay debts, and particularly the sum of 1000*l*. to charity, in case it ought to be charged upon the personal estate.

That the testator having no issue but his said daughter *Anne*, and she dying about the age of six years, before her portion became payable, the devise of the estate in *Somersetshire* did take effect to said *Robert Syderfin*, and the heirs male of his body, subject to the said 1000*l*.; the same being of the yearly value of 500*l*.; which ought to be charged thereon, or at least upon the personal estate, and to be paid and applied, as the said testator did by deed or writing in his lifetime declare; in case any such deed or writing were made and produced; and in case no direction or appointment were made, then the said 1000*l*. and the produce thereof ought to be employed as His Majesty in this Court shall think fit to direct and appoint; and no advantage or benefit ought to be had by the said devisee of the lands or the executrix by the neglect or omission in not directing or limiting, to what particular charitable uses the said 1000*l*. should be paid and applied; it being clear, that it was his intention and design, that the same should be paid out of his estate and applied to charitable uses.

That the defendants contriving to defeat the said charitable gift, do detain and conceal the said deed and writing, whereby the said charitable uses are limited and directed by the testator; and consequently the charity is in danger of being lost without a discovery, whether such deed or instrument was made, whereby the particular charitable uses the said 1000*l*. was limited to might appear; and that in case no such do appear, then the said 1000*l* ought to go to such charitable uses as this Court pursuant to His Majesty's gracious pleasure would direct: His Majesty having signified his gracious intentions, that the same should be paid to the relators, to be employed for the use of the mathematical boys on His Majesty's new Royal Foundation in Christ's Hospital, in such manner as His Majesty should think fit.

Whereto the defendants by their answers insisted upon the insufficiency of the personal estate to pay the debts besides the funeral expenses and charges of proving the will; and that the real estate in *Somersetshire* was leased out for two or three lives, or for long terms of years determinable upon lives under small yearly rents, which if clear and free from leases and encumbrances might be worth 600*l*. per annum; and for the *Surrey* lands the same were sold; and the money thereby raised was disbursed in paying the defendant *Anne* her legacy of 1000*l*. And as touching any instrument in writing, whereby the said testator did direct the particular uses, persons, or places, the 1000*l*. for the charitable uses should be paid, the defendant *Robert Syderfin* doth by answer set forth, that he hath diligently sought, but cannot find any; and if no such shall appear, he is advised the devise of the 1000*l*. is void; and submits the same to the judgment of the Court; but saith, that the present rents are not sufficient to pay the 200*l*. per annum devised to the other defendant the executrix: whereto the said plaintiff's counsel insisted, that the bequest of this 1000*l*. to charitable uses is a trust on the estates; and where there is no direction, how the same should be applied, it is in the power of the King to appoint the same; and His Majesty having made such appointment, as aforesaid, it ought to be applied according to such appointment.

Whereupon his Lordship declared, that this legacy of 1000*l*. was a charity well devised; though there was no direction, how the same should be applied; and there being no direction yet found for the employment thereof, it ought to be employed, as His Majesty hath directed. But how and when the same shall be raised and paid being the question, the plaintiff's counsel proposed, that the said defendant *Robert* might pay 100*l*. per annum for ten years in satisfaction of the 1000*l*.; and the defendant *Robert Syderfin*, present in Court, consenting thereto, His Lordship doth order and decree, that the said 1000*l*. be paid to the said relators accordingly by 100*l*. a year, yearly payable on every Candlemas day for ten years next, till the whole be paid to the relators, giving a sufficient receipt or discharge for the same under their common seal; the first payment to begin and

that case is, that the man had declared he had executed an instrument giving to charity; which instrument is not to be found; and the fund was given by the King to Christ's Hospital. But * there is a great difference in that case upon the circumstance, that the testator had declared his intention. *Vaston* may be compared to the paper in that instance; and to make the cases similar, the paper ought to have been destroyed; and the testator ought to have known that.

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In *Frier* v. *Peacock* (a) the testator had declared the fund was to go to some defined particular charity. So in all the cases, *The Attorney-General* v. *Hickman*, (b) *White* v. *White*, (c) and *Widmore* v. *Woodroofe*, (d) the testator himself had pointed out some particular charity, to which his property was to be applied. Is it possible to collect from this will any intention for general charity? Is not the charity intended to be created by *Vaston* only? Though certainly he could not take the property beneficially, he was not in the situation of a common trustee; which requires some purpose declared and a fund.

Some late cases have gone a great way to weaken the old authorities; and the late inclination of the Court has been not to dispose in general charity, where a particular one is pointed out. The late Master of the Rolls in *The Attorney-General* v. *Whitchurch*, (e) after great consideration of this subject, adopted the opinion of Mr. Justice *Buller* in *The Attorney-General* v. *Goulding*, (f) according to *The Attorney-General* v. *The Bishop of Oxford*; (g) that, where there is a defined object, and it cannot take place, as, if it is void by the Statute, (h) it is wholly void; and the fund goes to the next of kin; and is not to be laid out in general charity, according to the preceding cases. *Brown* v. *Yeall*, the case upon *Mr. Bradley's* will, is not to be distinguished from this case. The disposition was held void for uncertainty; and the property went to the next of kin, not in general charity according to the older cases. In *The Attorney-General* v. *Boultbee* (a) Lord *Alvanley* in very clear and intelligible language states the

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be made on Candlemas day next; and when and as often as the said 100*l.* per annum shall be paid unto the said relators, Sir *Robert Lyard*, Knt. &c. is to see the same put out at interest, till the whole 1000*l.* be paid, and to compute the charge of this; and when the 1000*l.* is to be paid into the said relators hands, the said master is to see the said money and all interest arising thereby, (the said charge of this present being first deducted out of the said interest,) laid out in lands, tenements, or rents, and settled on the said relators; whereby the proceeds thereof may be employed for the use of the said mathematical boys in His Majesty's new Royal Foundation in Christ's Hospital for ever; and on payment thereof the said defendant *Robert Syderfin* is and shall be hereby from time to time protected and saved harmless and indemnified, and his said estate in the county of *Somerset* discharged of and from the same, in case any direction shall hereafter be found of the said *Thomas Syderfin*, directing and limiting, how the said 1000*l.* shall be paid.

(a) *Finch*, 245. (b) 2 *Eq. Ca. Ab.* 193. (c) 1 *Bro. C. C.* 12.
(d) 1 *Bro. C. C.* 13 n. *Amb.* 636. *High.* part 2. 10.
(e) *Ante*, vol. iii. 141. (f) 2 *Bro. C. C.* 428.
(g) Stated, (in *Corbyn* v. *French*,) *Ante*, vol. iv. 431, from the Register's book. (h) 9 *Geo.* II. c. 36.
(a) p. 47. *Ante*, vol. ii. 380. vol. iii. 220.

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effect of this doctrine; (*b*) adopting all that is rational, and rejecting the rest. It was also before the Court in *The Attorney-General* v. *Andrew*. (*c*) The case of *Wheeler* v. *Sheer*, (*d*) though in a book of no great authority, appears by an examination of the Record to be truly reported. It differs from *The Attorney-General* v. *Syderfin* in this; that the appointment was to be by a subsequent instrument: in the other case the party had appointed. Lord *King*, who decided *The Attorney-General* v. *Hickman*, also decided this case. It sufficiently appeared, though there was no appointment, that the object was general charity; and it cannot be distinguished in substance from this case. In the cases before Lord *Thurlow*, and in *Baylis* v. *The Attorney-General*, (*e*) and *Cook* v. *Duckenfield* (*f*) charity was the substance; and the discretion of the trustee was merely the mode, secondary and subordinate to that general object, which was the essence of the gift. This case comes nearer to the class of cases upon powers; such as *Brown* v. *Higgs*; (*g*) upon which the rule is, that, though the Court will supply a defective execution, it will not for any purpose supply the non-execution. The leading authority upon that is *The Duke of Marlborough* v. *Lord Godolphin*. (*h*)

[48] This testatrix might have intended a different disposition as to her general property from the particular charitable legacies. The inference is, that she had given specifically to all the charities, for which she had any respect. As to the residue no charity can take except by the act and under the authority of *Vaston*. Upon the whole will there is a personal confidence in him alone; and that power cannot be exercised by the Court, or delegated to any one else, without exceeding the will. Such a personal confidence may be committed upon a motive rational and intelligible; perhaps to a person distinguished by zeal for charity, for instance, *Mr Howard*, or *Mr. Hanway*; proceeding evidently upon the character, peculiar views, skill and intelligence, of the individual. Is the intention executed *cy pres* by sending that to the Master's office? The appointment of a particular person may be itself the recommendation of a particular charity: for instance, if it was left to the discretion of the person, who instituted, and particularly patronised, the Humane or Philanthropic Society. The recommendation would have very different effects, as applied to different persons. *Vaston*, for instance, was a Quaker. Can there be a doubt, that she meant him to follow the example of her own charity, and to attend particularly to the objects of her own bounty, her poor relations? There can be no doubt it would have given her the utmost pain, to see all this property given away in what this Court would consider objects of charity; leaving these relations, the objects of her bounty, without any thing. The words have a different meaning

(*b*) *Ante*, vol. ii 387. (*c*) *Ante*, vol. iii. 633.
(*d*) *Mos*. 288. 301. (*e*) 2 *Atk*. 239. (*f*) 2 *Atk*. 562. 567.
(*g*) *Ante*, vol. iv. 708. vol. v. 495. (*h*) 2 *Ves*. 61.

according to different feelings and dispositions. The only apprehension the testatrix felt was, that *Vaston's* persuasion might prevent him from attending to those whom she intended to favour. If she had given the fund over, in case *Vaston* should not make a disposition, or if he should die in her life, to an object, to which it could not be applied, or if he had shown an intention to execute, though illegally, it must have gone to the next of kin, not to any general charitable purpose. It is true, as Lord *Thurlow* says, the death of the trustee cannot affect the intention. That however is, where it is clear what the trustee was to do: but where it is of so discretionary a nature, that his act is absolutely necessary to create the trust, his death puts an end to the disposition. It is impossible to suppose any particular charity in the view of the testatrix in this event. There is great reason for inferring, that never having renewed this charitable bequest, or given it to any other purpose, she considered, that by the death of *Vaston* it failed; and either meant to revoke, or considered it gone, or never could fix upon another person, in whom she might repose the same power. It cannot be considered the dry case supposed by Lord *Thurlow*. Lord *Rosslyn* thought it impossible to execute this report; observing, that it was making, not construing, a will. The danger of such a discretionary bequest with reference to the Statute *(a)* is a very material consideration. It has never been decided, that where an absolute discretion is given to a person to dispose in charity, he cannot lay out the fund in land. Why could not *Vaston* have established and endowed a school by act in his life? The decree certainly is new. It is an attempt to execute an indefinite, vague, intention, which is not expressed. To what extent poor clergymen are to be relieved is not defined. It is impossible for the Court to execute the intention. They may do something like it, and for the general purpose of charity: but they must make a will for the testatrix; and in so doing they may go perfectly in opposition to her intention.

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The next question is, if this fund is not the property of the next of kin, what is to become of it. If the disposition is in the Master's Office, he will hold himself bound to give a great part to clergymen, to the exclusion of the relations; who will fare better under the Crown's disposition of this charity. This cannot be considered a trust; for which the object and the property must be certain, and not liable to be disappointed; and it must be a trust at the death of the testatrix, or not at all. It must be considered a mere recommendation; and *Vaston*, having power to give to any charity he thought proper, might have excluded poor clergymen. According to all the cases it must go to the Crown; and in that way there is no scheme: but the *Attorney-General* suggests objects. It is surprising to consider, how far the Court has gone upon that. In *De Costa* v. *De Pas (a)* certainly the intention was very little followed.

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(a) Stat. 9 *Geo.* II. *c.* 36.

(a) p. 50. *Amb.* 228.

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That was preceded by *Baxter's* case *(b)* and *The King* v. *Lady Portington*, *(c)* and followed by *The Attorney-General* v. *Herrick* *(d)* and others; which have established, that, where the gift is to a charity, which may take place by law, but is uncertain in its objects, the Crown may appoint; and, the purpose being general and indefinite, this Court cannot act. The same rule holds, where it is indefinite, and where it is illegal; as a devise to a superstitious use. In *The Attorney-General* v. *Herrick*, Lord *Bathurst* with reluctance, but upon full consideration of the cases, determined, that the disposition was in the Crown. The decision upon *Mr. Bradley's* will *(e)* contra-

(b) 1 *Vern.* 248. The decree was reversed in *The Attorney General* v. *Hughes*, 2 *Vern.* 105. See the note, *ante*, vol iv. 433, 434, to *Corbyn* v. *French*.

(c) 1 *Salk.* 162.

(d) *Amb* 714

(e) *Brown* v. *Yeale*. In Chancery, upon farther directions, *July*, 1791, Reg. Lib. A. 1790, folio 579.

Ralph Bradley by will, dated 27th *December*, 1788, gave as follows: "I give "all such stocks, annuities, and monies, in the public funds as I shall be pos- "sessed of or entitled unto at the time of my decease, in my own right, to the "said *George Brown*, *Rowland Webster*, and *John Brewster*; and I declare and "direct that they shall stand and be possessed to and of the three per Cent. "Annuities, which may be purchased in pursuance thereof, and directions "hereinbefore mentioned, upon the trusts hereinafter declared: that is to say, "in trust by and out of the dividends and yearly income thereof to pay to the "said *Mary Stevens*, the yearly sum of 50*l.* during her life, at the times and in "the manner hereinbefore appointed for that purpose; and to the said *Rebecca* "*Fowle* 14*l.* during her life; and in trust by and out of the dividends and "yearly income of the said stocks and annuities, and monies in the public funds, "but subject and without prejudice to raising the said yearly sums of 50*l.* and "14*l.* to raise and levy so much money as the provision hereinbefore made for "the payment of my debts and legacies may happen to be deficient for that "purpose, and to apply the money to be raised for the supplying and making "good of such deficiency; and upon trust in the same manner to raise and "levy so much money as shall be deficient to pay and satisfy such pecuniary "legacies, as I by any codicil or codicils under my hand shall give or appoint; "whether the same shall be attested by any witness, or not: and to apply the "money so to be raised for the answering that purpose accordingly; and in "trust out of the dividends and yearly income of the said stocks, annuities, "and monies in the public funds, and out of the stock and annuities to be pur- "chased as hereinafter mentioned, but subject and without prejudice to the "trusts aforesaid, to raise and apply the yearly sum of 500*l.* for the term of "twenty years, to commence and be computed from the end of three years "next after my decease, and from that period of twenty years the yearly sum "of 1000*l* until the 5th day of *January*, which will be in the year of our "Lord 1860, to and for the purposes hereinafter expressed; and in trust to "invest from time to time the residue of the said dividends or yearly income "of the said stocks, annuities, and monies, to be from time to time purchased "under the direction or in pursuance of this my will, in the purchase of stocks "or annuities of the same nature; and I direct, that as well the said two yearly "sums of 500*l.* and 1000*l* during the continuance thereof respectively, as the "interest and yearly dividends to arise from and after the fifth day of *July*, "1860, as well from all the said stocks and annuities to be purchased or ac- "cumulated under the direction or in pursuance of this my will, as from such "stocks, annuities, and monies in the public funds, as I shall be possessed of "in my own right at the time of my decease, shall, subject and without preju- "dice to the trusts aforesaid, be from time to time for ever applied in the "purchasing of such books, as by a proper disposition of them under the "following directions, may have a tendency to promote the interests of virtue "and religion and the happiness of mankind; the same to be disposed of "in *Great Britain* or in any other part of the British dominions: this chari- "table design to be executed by and under the direction or superintendency "of such persons, and under such rules and regulations, as by any decree or

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dicts those cases.(a) It is much to be lamented, that there is no account in print or manuscript of what passed in that case. It has been said to be anomalous; and not a case of charity; but it is very difficult to sustain that * opinion. There is a considerable number of institutions in this country for the purpose of public instruction; which are always considered eleemosynary; great bodies with large funds; as the Society for propagating the Gospel; who are within *Mr. Bradley's* will. It is very difficult to consider, how the dissemination of *Baxter's Call to the Unconverted*, and the Jewish case, can be considered and acted upon as charities, and yet a purpose of instruction according to the established law of this country is not a charity. That case therefore seems to be a charity case, and new; and the effect of it is to restrain the latitude of former decisions upon this subject. A new decision upon a subject of this nature, is not attended with the same inconvenience as upon the ordinary subjects of property. The effect is, not disturbing titles, but only requiring testators to express their objects clearly. Considering the great amount of personal property at this period, it may be competent to the Court upon principles of public policy to change its rule upon such a subject. If such a scheme as is approved by this Report, is not to be supported, *Thomas Walker*, though the particular object of the testatrix's bounty, must lose every thing. She had intended to give this estate first to his mother, and afterwards to him: but afterwards she thought, money would be more useful to him than land. She had a great regard for him: advanced money to him repeatedly: but she casually omitted to make a new will. He will have a strong claim, in case the disposition should be in the Crown. It is not easy to conceive, how the disposition of such a charity comes into this Court. If the charitable intention is sufficiently described for this Court to know the object, that may be the subject of a scheme to effectuate that particular intention. But upon such a charity as this, the proposal of a scheme is the creation of a new charity, that never existed in the mind of the testatrix; a disposition perfectly arbitrary, by a mere direction to the Master to say, what is a proper mode of distributing 50,000*l.* in charity. That is proper for the Crown, the general guardian of charities. In the *Attorney-General* v. *Syderfin* the natural supposition was, that the testator had destroyed the paper. Why was not that referred to the Master? In that respect there is no difference between the cases. It is a mistake to say, that a superstitious use is to be disposed of by the Crown. By the statute of *Ed.* VI.(a) property given to a superstitious use is given to the

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" order of the High Court of Chancery shall from time to time be directed in " that behalf."

The bill prayed, that the charity intended by the said testator might be established, and directions given for carrying on the same.

(a) See also *Townley* v. *Bedwell*, *ante*, vol. vi. 194.

(a) p. 53. Stat. 1 *Ed.* VI. c. 14.

1802. Crown, not to be disposed of in charity. But that Statute applied only to superstitious uses then existing: those since created are merely void. (*b*) In cases, that *are not considered here as superstitious uses, the King has the disposal, because the charity pointed out cannot be carried into effect; and then it is only a gift in general to charity. So in every case of a general gift to charity, without pointing to a particular one, the Crown has the right of disposition. The true distinction upon this point is, that, where the charity is sufficiently described, this Court will carry it into effect: but, where there is a mere general gift to charity without any description of objects, this Court does not create a charity: but the right is in the Crown. If therefore this is to be considered a charity, it falls to be disposed of by the Crown, by sign manual; and is not a subject of administration in this Court.

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The Solicitor-General, (*a*) *and Mr. Finch, for the Plaintiff, the Executor, in support of the Decree.*—The principle, as it is pressed against the charity, is carried to a pitch of extravagance, as great as that to which the Court formerly went in the opposite direction. There is a fashion in opinion as well as in other things: hence prejudices may arise; and the aversion to a particular absurdity may run into as great an absurdity. These dispositions, at the expense of poor relations, "*to endow a college or a cat*," cannot be justified. They are destitute of all moral principle. But, where the testator satisfies the claims of relations, or has none, whom he knows, or, who have not forfeited the claim upon him, is there any thing unreasonable in selecting proper objects? It is at least doubtful, with reference to human happiness and misery, whether there are not many institutions, to which property may be applied as usefully as to enrich a spendthrift heir. If the principle is carried too far, it may have a very bad effect. If on account of the vanity, which may be discovered in the purpose, it is to fail, your Lordship will abridge many of the motives to the best of these institutions. A charity established during the life of the party is drawn from that fund, which would accumulate for the benefit of heirs and next of kin. If such an application of property is proscribed from the vanity of the motive, the lists of subscribers to the charities of this country will be very much diminished. There is a broad distinction between real and personal estate. The policy of the country as to property in the funds, if it is to be collected from the Acts of the Legislature, has been very different of late years, upon a great principle of convenience, in allowing people to lock up their funded property. The late measure of the redemption of the land-tax, proceeds upon that principle; and it may be carried farther.

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All the argument upon this will depends upon this; whether

(*b*) See *De Garcin* v. *Lawson*, *ante*, vol. iv. 433, in a note to *Corbyn* v. *French*.

(*a*) The Honourable *Spencer Perceval*.

Vaston is to be considered a trustee under it, and a trustee for charity; for it is conceded, that, if that is made out, his death makes no difference whatsoever in the validity of the bequest; whatever difference it may make in the manner of carrying it into effect. The legal interest in the residue unquestionably passed to him; and the intention was, that he should take in trust for charity. As to the effect of the word "recommend," there is no question, that the fund is certain; and *The Attorney-General* v. *Syderfin* is an authority, that the objects are sufficiently certain; and that case is clearly recognised by all the succeeding cases, looking to that authority: the application of money to charity, being in principle, distinguished from that to any other object; for any other object becoming general and indefinite would be void for uncertainty. The indemnity, ordered in that case, shows it did not go upon the supposition, that the writing was destroyed. It is not to be concluded, that it went upon any assumption that it was not destroyed by the testator: but, leaving that in doubt, it was held, that in the mean time the money should be applied by the King. If it appeared, that the paper had been destroyed by the testator, the effect would be only, that by destroying it he intimated an alteration in his mind as to those specific objects: but, the phrase of the will not being altered, the general disposition to charity was left unaffected. If this testatrix is to be considered as knowing, that the trustee was dead, as upon the evidence she must be, the inference is, not that she meant the legacy for charitable purposes should be void, but that she still intended the general application to charity to survive him, and to be carried into effect in legal course; for, if she is supposed to know the effect of lapse, she may also be supposed to know, that her general disposition would be carried into effect notwithstanding his death. [56]

The case of *Wheeler* v. *Sheers*, does not apply: first, as Lord *Thurlow* observed, (a) in *White* v. *White*, there being no actual declaration at the time of any positive disposition to charity: but it was to be future, by codicil. Secondly, the codicil afterwards executed recites that provision in the will, and directs the application to such uses and purposes as by any other codicil or codicils shall be directed; and in that codicil he omits the word "Charitable." It certainly does not exclude his contemplating charity as one of the objects: but the omission of that word, as far as it goes seems to have the effect of cancelling the operation of the will. The judgment appears to go upon both these considerations. That case, and *Brown* v. *Yeale*, are the only cases produced in favour of the next of kin. The latter does not appear to have received much attention, or to have been very strenuously argued. There is no note of what Lord *Thurlow* said. The object expressed was so absurd and impracticable, that it was impossible to execute it. One difficulty was as to the man- [57]

(a) 1 *Bro. C. C.* 15.

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ner in which the books were to be communicated. It is not very easily to be reconciled with other cases decided by Lord *Thurlow*. It seems to be contended, that this Court would not have controlled *Vaston's* conduct farther than to prevent him from applying the fund for his own benefit, and perhaps to lock up the money in the Court. That is against a case in *Eq. Cas. Ab.*; (a) which shows, that a disposition to charity is a disposition sufficient for the Court to act upon. The Lord Chancellor there says he would not take away the discretionary power. So here the Court would not control the discretion given to the individual; but would superintend his disposition, and prevent abuse. The same principle is found in *Cook* v. *Duckenfield;* which case also was referred to the Master to approve a scheme, the subject not being considered in the disposition of the Crown. With respect to the case put by your Lordship, of the death of the trustee, when just going to act, or, if he was not to be found, having gone abroad, the question is, whether he was a trustee: if he was, there would be no difficulty in any of these cases. *The Attorney-General* v. *Herrick*, also shows, that the uncertainty of a bequest for charity is no objection; and Lord *Bathurst* was inclined in favour of the heir; but found the authorities too strong. In that instance there was no scheme; nor in *The Attorney-General* v. *Syderfin*, and *The Attorney-General* v. *Peacock.* (b) In *The Attorney-General* v. *Hickman* (c) the persons, who were to make the disposition were gone: but it was held, the charity subsisted; and might be answered as fully by this Court. These authorities are not disputed: but distinctions are attempted; first, that the particular charity is pointed out by this will.
[58] The answer is, that a general bequest to charity is in the contemplation of this Court a particular bequest.

The case of *The Attorney-General* v. *Doyley* (a) has been

(a) *Anon.* 2 *Eq. Ca. Ab.* 190. Pl. 3.
(b) Cited *Amb.* 713. (c) 2 *Eq. Cas. Ab.* 93.
(a) p. 58 4 *Vin.* 485. 2 *Eq. Ca. Ab.* 194.
Doyley v. *Doyley*, } 1st Dec. 1735.
Attorney-General v. *Doyley*, } Reg Lib. A.

Timothy Wilson, by will, dated the 22d of *March*, 1714, gave all his real and personal estate to two trustees, &c. in trust, to pay the produce thereof to his niece *Elizabeth Wilson*, for her life; and after her death he gave the same to the sons and daughters of the said *Elizabeth Wilson* successively, with divers limitations; and in case there should be no issue, or they should all die under twenty-one, then the said trustees were to dispose of his real and personal estate to such of his relations, of his mother's side, who were most deserving; and in such manner and proportions as they should think fit to such charitable use as they should think most proper and convenient.

The mother died without issue A bill filed by some of the next of kin on the mother's side, praying an account, and to have their share of the estate; and a cross bill by the Attorney-General to have the same applied to charitable uses as the Court should direct.

The decree of the Master of the Rolls, after directing the usual accounts and arrangement of the testator's assets, directs as follows: "And what shall "appear to be the neat surplus of the monies arising from the real and personal "estate of the testator, the produce thereof, the same is to be divided into "moieties; whereof one moiety is to be distributed, share and share alike, "amongst all the relations of the testator on the mother's side, who are within

found in the Register's book; and is generally correct, the differences being merely verbal. The latter *branch of that case cannot be distinguished in any part from this. It is also an authority for a scheme upon this sort of general bequest, not a disposition by the Crown. One of the trustees had released: the other probably submitted to act, as the Court should direct. The disposition therefore fell upon the Court. *The Attorney-General* v. *The Bishop of Chester*, (a) is an authority to all these points. In *Widmore* v. *Woodroofe* (b) there was an end of the trustee's discretion, as much as if he was dead: yet the disposition was upheld by the Court. *The Attorney-General* v. *The Mayor*, &c *of London*, (c) is not to be distinguished in principle from this. There was a total failure of objects: but it was considered as a general charitable bequest; and to be appointed *de novo* by a scheme. *De Costa* v. *De Pas* likewise bears upon this question very strongly. The principle established by all the authorities is, that a bequest to charity merely is sufficiently certain. A charity, as defined by Lord *Camden*, is a public institution for a public purpose. Whether the word is expressed in the singular or plural number is not material. The only effect of the word in this will being in the plural number is, that the testatrix did not mean one charity to absorb the whole. The argument from that is, that charitable donations to individuals are intended: but according to common language the singular number would better answer that interpretation. Those, however, who are to support this charity, are not interested to contend against the construction, that the disposition is to be to individuals, to be received at once, out and out.

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The only question of reasonable doubt is, whether the disposition is to be in this Court by a scheme or by the Crown at once without that form. Very little is to be found on this point; and it is difficult to ascertain precisely the ground of distinction. From all the early cases it is clear, that, where the bequest is indefinite and uncertain in its object, a general bequest for charity, it would be for the Crown to dispose of it: so,

"the degree of third cousins, and were born at the death of the said *Elizabeth* "*Wilson*, and are now living; and as to the other moiety of the said estate, all "parties are to be at liberty to propose schemes before the Master for distributing the same out and out in charity; and herein the several poor relations "of the said testator, who shall not be partakers of the other moiety, are *cæteris* "*paribus* to be preferred. The Master to state to the Court what would be the "proper scheme, subject to farther directions."

Report as to one moiety, dated 13th *July*, 1737, whereby forty-two relations were to receive 56*l.* 14*s.* 1½*d.* each.

Upon further directions, 26th *July*, 1737, Reg. Lib. A. 545, it appears that the Master certified by his report, that he had out of the several schemes laid before him by consent of parties made up one entire scheme for the other moiety out and out in charity according to the terms of the scheme: viz. 400*l.* to eight poor relations of the testator; the like sum to the Westminster Infirmary: and other sums to other public charitable institutions, and among others to the parishes in the town of *Guildford*.

(a) 1 *Bro. C. C.* 444. (b) 1 *Bro. C. C.* 13. *n.* *Amb.* 636. *High.* part. ii. 10.
(c) 1 *Bro. C. C.* 171.

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where it is clearly a disposition to charity, but to be carried into execution in a way the law will not allow, as in *De Costa* v. *De Pas*, there also the disposition is in the Crown; upon the principle, that, the distinct object failing, nothing remains but the general object of charity. The distinction seems to be, that where the party has pointed out any particular object, defined in any degree, there it is not looked on as being in the disposition of the Crown; which might overlook the intention completely, and appoint arbitrarily. Therefore, where any particular object has been pointed out, the Court has considered it as for its own disposition; in order to secure, as far as possible, the attainment of that object. So, where the object is legal, but from circumstances it is impossible that it can be executed, there the Court takes it, with the same view; to carry it into effect upon some scheme, as near as possible to that intended, as in *The Attorney-General* v. *The Mayor, &c. of London;* not leaving it quite at large. The Court, where a trustee is appointed, will put themselves in the place of the trustee; [61] and there is more reason for that from the nature of this charity. Your Lordship would put yourself in the place of a conscientious trustee; who, whatever construction is to be put on the word "recommend," as to which all the cases are referred to in *Pierson* v. *Garnet*, (a) would not disregard the recommendation. But the Crown would not be bound by it. The distinction is certainly faint: but it seems to be, that, where the object is clearly general and uncertain, the Crown is to have the disposition: where the object is pointed out, and is legal, but cannot take effect, the Court would apply it as near as can be. (b) The cases for the disposition by the Crown are *The Attorney-General* v. *Syderfin*, *De Costa* v. *De Pas*, *Isaac* v. *Gompertz;* and *The Attorney-General* v. *Herrick*. *Isaac* v. *Gompertz*, a remnant of *De Costa* v. *De Pas*, was before Lord *Thurlow*, 17th *July*, 1786; who allowed every legacy, except an annuity given for the support and maintenance of the Jewish Synagogue in *Magpie Alley*. The decree declares, it is not to accrue to the personal estate; but ought to be applied to some charitable use by the Crown; and recommended to the *Attorney-General* to apply to the Crown for a sign manual. In *The Attorney-General* v. *Herrick* it appears by the Register's book that all directions, touching the application of the residue of the personal estate, and the produce of the sale of the real estate and the rents and profits, were reserved, until his Majesty's pleasure should be known, how it was his will the same should be disposed of. (c)

(a) 2 *Bro. C. C.* 38. 226. *Finch's* Prec. Ch. 201. The latter note *Mr. Finch* observed was corrected by Lord *Kenyon*.

(b) *Mr Cox* said, that distinction was taken in *The Attorney-General* v. *Matthews*, 2 Lev 167; and the Lord Chancellor observed, that by a manuscript note it seemed to be the notion of *Mr. Brown*, a considerable practiser in this Court in Lord *Hardwicke's* time.

(c) Reg. Lib. A. 1772—239.

These are cases, in which the object was against the policy of the law, or uncertain and general; not applicable therefore to this case. They are overbalanced by the cases in favour of a scheme: *The Attorney-General* v *Oglander*, (a) *Sonley* v. *The Clockmaker's Company*. (b) *The Attorney-General* v. *Doyley*. *Cook* v. *Duckenfield*. *Widmore* v. *Woodroofe*. *The Attorney-General* v. *Clarke*. (c) *The Attorney-General* v. *Andrew* (d) is certainly a very extraordinary case; that a plan for the particular benefit of the University of Cambridge, should be applied to the University of *Oxford*, by a compromise between the next of kin and the *Merchant Taylors Company*, (e) Upon all these authorities this decree ought to be affirmed.

Mr. Cox, *for the Attorney-General*, contended against the next of kin; but, that the decree was wrong in directing a scheme: this being a charity of that general nature, that the disposition fell to the Crown.

The question upon the first point is really, whether this is a trust or a power. There is no intermediate case. Could *Vaston*, if called upon by the *Attorney-General*, have refused to dispose of this in charity? Can it be supposed, that in the event this is undisposed of? That is impossible, unless it can be said, that *Vaston*, if living, could have kept it for his own benefit. The Court acknowledges a disposition to charity as a substantive disposition in some mode or other against the next of kin. If the primary intent was the disposition by *Vaston*, that would have been better secured by giving the fund to him. If charity is the *Cestuy que trust*, why is the death of the trustee to defeat that trust more than any other? If the testatrix had communicated her intention to *Vaston*, the case would be different; a case, not of discretion in him, but of a declared purpose, like the instance of the paper which could not be found. In the case of *Downing College*, (a) upon which a very elaborate argument was given by Lord Chief Justice *Wilmot*, a considerable part of that argument was upon this very question; how far the death of the trustee can disappoint the *Cestuy que trust*. Lord Chief Justice *Wilmot* says, the legal estate follows the trust; that there is an essential difference between powers and trusts: if the trustees will not, or cannot, act, the constitution has provided a trustee: the King, as *Parens Patriæ*, has the superintending power over all charities, abstracted from the statute 43 *Eliz.* and antecedent to it, 2 *P. Will.* 119; and that paternal care and protection is delegated to this Court. Where no trustee is appointed, this Court assumes the office in the first instance. His Lordship also considers there, whether the primary object of execution

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(a) 3 *Bro. C. C.* 166.
(b) 1 *Bro. C. C.* 81.
(c) *Amb.* 422.
(d) *Ante*, vol. iii. 633.
(e) *Andrew* v. *The Merchant Taylors Company*. Post. {p. 223.}
(a) p 63. *The Attorney-General* v. *Downing*. *Amb.* 550. 571. *The Attorney-General* v. *Bowyer*, *ante*, vol. iii. 714. vol. v. 300. *The Attorney-General* v. *Vigor*, Post. {Vol. viii. p. 256; vol. xi. p. 563.} The note cited on this occasion was that of Lord Chief Justice *Wilmot*, since published in his Reports, page 1.

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by a particular person shall prevent the general object, and the question, whether if the trust is illegal, and void, or not fit to be executed by a Court of Equity, this Court would execute it, as far as the rules of law and equity will admit. He says, this Court has long made a distinction between superstitious uses, and mistaken charitable uses. Property destined to the former is given by Act of Parliament to the King, to do what he pleases with; and properly falls under the cognizance of a Court of Revenue. The reason of the distinction is, that in the latter case the donation is considered as proceeding from a general principle of piety in the testator; and this Court
[64] carries on that general intention. There is also the presumption, that this testatrix would have taken another charity, if told that could not be executed. What difference can particular charities make, except by limiting the Court or the Crown, as the trustee would have been limited? *The Attorney-General* v. *Hickman* goes the whole length of this case. There was a discretion in the trustee, as to which non-conformist ministers; and it might have been as well said there, and in *Widmore* v. *Woodroofe*, that some particular reliance was placed in the trustee, that he knew the intention better than any one else. In *The Attorney-General* v. *Doyley*, the Court was not afraid of the difficulty from the bequest partly to relations, and partly to charity; and the uncertainty, how much was to go to charity, did not prevent it.

Upon the other point, the disposition is in the Crown, not in this Court. At one period something like a rule was established, that, when the gift is to charity generally, it belongs to the King to point out the particular charity, as to declare, what charity should take, as a branch of the prerogative; but, where the particular charity was pointed out, it devolved upon the Court. There is no case, in which that is much considered, except *The Attorney-General* v. *Matthews*; (a) in which it seems the direct point. In subsequent cases the disposition has been sometimes in one way, sometimes in the other; and it is impossible to reconcile them. Some of them depart from the rule: but the point was not raised, and brought fairly to decision in one case. There is nothing to defeat the old rule, once established, as it seems, upon the immediate consideration of that point. No one was ever much interested to consider it.

Mr. Lloyd, *in Reply*.—None of the cases have such words
[65] as this will; importing, not a trust, but a personal confidence, that a charity created by this individual, and such charity only, should take; and if there should not be any such, then it is to be considered as if the residuary legatee had died in the life of the testatrix. Your Lordship will not strain this will to make it conform to the old cases. If Lord *Northington* and other judges had not stemmed the torrent, there would have been a vast number of charity cases of another kind.

(a) 2 *Lev.* 167.

They received one check in *The Attorney-General* v. *Tyndall*; (*a*) by which Lord *Hardwicke's* decrees were overturned. In another instance they have received a great blow by restraining the doctrine, that the fund may be applied to a charity directly opposite to that specified by the testator: *Corbyn* v. *French*; (*b*) and *The Attorney-General* v. *The Bishop of Oxford*, which is accurately stated, (*c*) in that case. Lord *Alvanley* expresses his opinion upon that point, that the Court had deviated from the former course. I do not admit, that, if *Vaston* had made an indiscreet appointment in favour of any charity, the court could have controlled that: neither could the court have compelled him during his whole life to appropriate it to any particular charity. If he had made an appointment in favour of Queen *Ann's* bounty, or any other, that would have been void within the statute of *George* II. (*d*) the court could not possibly have executed it as a general charity. What ground is there for the assumption in favour of some general charity in the event of no appointment by *Vaston*? It may as well be conjectured, that, if that event had been pointed out to the testatrix, she would have said, in that case it should not go in charity. It is like every other case of lapse.

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The Attorney-General v. *Syderfin* is the foundation of all these cases; and when that is looked into, there never was a determination like it. A proceeding appears to have taken place, of which there is no idea now. It is said, the King, being informed that there was no such writing to be found, had declared his will and pleasure, that the money should be laid out for the benefit of the foundation in Christ's Hospital; and without any proof on either side that decree was made. That was a very extraordinary interference of the Crown antecedent to a decree. No such proceeding appears in any other instance. Was not the heir entitled to an issue, whether the paper was lost, or, whether the testator had done any act with respect to it? He put it in issue by insisting upon that: but the Court appears to have decreed without any evidence. The note at the bottom is most extraordinary. Suppose the issue had been found in favour of the heir: could the Court possibly have decreed in favour of any particular charity? If it could have been made out, that such a paper had never existed, or, that it had been destroyed, the Court would not have made the decree. The case does not import the contrary: for there is an indemnity upon that. If no paper had existed, that would have brought it to *Wheeler* v. *Sheer*, and *Cook* v. *Duckenfield*. The answer to all the cases is, that they are cases of clear trust, and the objects were pointed out, and no personal confidence was placed in any one individual in the execution of the charity. In *The Attorney-General* v. *Doyley*, how could the trust devolve upon the Court, the trustees being alive, and ready to act? In *Wheeler* v. *Sheer*, which case is in

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(*a*) *Amb.* 614. *Chapman* v. *Brown*, *ante*, vol. vi. 404.
(*b*) *Ante*, vol. iv. 418. (*c*) *Ante*, vol. iv. 431. (*d*) 9 *Geo.* II. *c.* 36.

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the Register's book, it is quite clear the charity went a different way from the intention. Supposing the word "charitable" to be left out of the first codicil, the second codicil expressly revives the will. No specific object was pointed out; but certainly there was a general intention for charity, to be specified by a subsequent codicil. *The Attorney-General* v. *Syderfin* was determined upon this ground only; that the testator had declared he had made an appointment: if not, it is to be presumed the decision would have been the same as in *Wheeler* v. *Sheer*.

As to the second point, a scheme in these cases seems very absurd; and is in fact the Master's disposition. What Lord *Hardwicke* says in *De Costa* v. *De Pas* is unanswerable. Certainly that course as to the sign manual was not pursued in *The Attorney-General* v. *Syderfin*. *The Attorney-General* v. *Herrick* shows, that, where the Charity is general, the King takes it, as *Parens Patriæ*, it is said: but where the objects are specifically pointed out, there it is by a scheme; for the King has no authority to take it from those objects. The later authorities have more reason than the former. The decree in *The Attorney-General* v. *Andrew* is certainly extraordinary; for a scheme according to what was nearest the intention: the particular object being as precisely fixed as could be. That case is not yet decided; (a) and it will be open to the next of kin. It is therefore no authority for a scheme.

12 *May*. *Lord* CHANCELLOR.—The late Lord Chancellor, I understand, intimated, that it was fit this cause should be re-heard. Upon what ground that recommendation was made, or upon what view of the case his Lordship was disposed to think so, I have not been able to collect from the argument. Whether his opinion was, that the declaration of the decree, that the residue of the personal estate was to be applied in charity, was not warranted by the true construction of the will, con-

[68] strued upon the principles, upon which the Court has acted with regard to charities, or, that if it was so warranted, the residue was not to be disposed of by such a distribution as would be contained in a scheme before the Master, but ought to be disposed of by the King, as *Parens Patriæ*, I have not been informed. That circumstance however makes it my duty to consider this case very anxiously; and that is considerably increased by my conviction, that, if the decree is affirmed, it would be a considerable surprise upon the testatrix. But, after the most anxious consideration, I cannot feel myself in a situation authorizing me to say, I am at liberty to depart from what appears to have been the established doctrine of this Court, as applied to those particular legatees called charities.

This will, I admit, struck me many years ago, and at present strikes me, as a will, that in the terms manifests as strong a purpose to place discretion in an individual, as can be ex-

(a) See *Andrew* v. *The Merchant Taylors Company*. *Post*. {p. 223.}

pressed by any terms: but, notwithstanding that, it seems to me, the cases have gone a length, upon principles wise or otherwise is not for me to determine, which has formed a precedent that binds me in this Court; and, whatever the House of Lords may think proper to do upon a review of these cases, it is much fitter, if they are to be departed from, that they should be departed from by the authority in the last resort than by an individual judge sitting here. The circumstance, to be found in Lord *Thurlow's* decree, giving the costs as between attorney and client, and the fact, that the rehearing was produced by an intimation from the Court itself, leave me no difficulty in saying, the expense of the re-hearing ought to be paid in the same manner. The nature of the question, as well as the authority of the recommendation, makes it not unfit, that all parties should have their costs as between attorney and client out of this fund. It is some consolation therefore to the Court, that this attempt will be no expense to them.

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In what the doctrine originated, whether, as supposed by Lord *Thurlow* in *White* v. *White*, (a) in the principles of the Civil Law, as applied to charities, or in the religious notions entertained formerly in this country, I know not: but we all know, there was a period, when in this country, a portion of the residue of every man's estate was applied to charity; and the ordinary thought himself obliged so to apply it; upon the ground, that there was a general principle of piety in the testator. When the Statute (b) compelled a distribution, it is not impossible, that the same favour should have been extended to charity in the construction of wills, by their own force purporting to authorize such a distribution. I have no doubt, that cases much older than those I shall cite may be found; all of which appear to prove, that if the testator has manifested a general intention to give to charity, the failure of the particular mode, in which the charity is to be effectuated, shall not destroy the charity: but, if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished. One of the earliest cases, mentioned in *The Attorney-General* v. *Syderfin* (c) is *Frier* v. *Peacock*. (d) According to that case, the generality of the gift made the effectuating it impracticable; and for that reason, the substance of the gift being to assist the poor, the Court substituted a practicable mode of assisting the poor; and reduced the number of legatees, whom that general term would embrace, to forty poor boys. That case is more fully stated in *Levinz*, (e) under the name of *The Attorney-General* v. *Matthews*; where the decision is thus stated: "and this "decree of the commissioners was now quashed by the Lord "Keeper *Finch*; because this being a general Charity, and

Formerly a portion of the residue of every man's estate was applied in charity by the ordinary.

If the general substantial intention of a will is charity, the failure of the particular mode shall not defeat it, but the law will substitute another mode.

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(a) 1 *Bro. C. C.* 12. (b) 22 *Char.* 2. c. 10. 29 *Ch.* 2. c. 3.
(c) 1 *Vern.* 224. (d) *Finch.* 245. (e) 2 *Lev.* 167.

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" for the poor in general, the commissioners have nothing to " do with it: but it is to be determined by the King himself in " this Court upon an information by the *Attorney-General* in " behalf of the King; which accordingly he directed to be " brought. And now upon the information the *Lord Keeper* " said, this general charity belongs to the King himself to dis- " pose, but yet to the poor; and therefore the disposal of 80*l.* " *per annum*, to *Paul's* was out of the trust, and void; and the " distribution to the three parishes good, and to be confirmed. " But as to the poor kindred of *Frier*, who prayed to be consi- " dered, no consideration, he said, could be had of them; for " the disposition must be such as may endure for ever: and " they cannot live poor for ever. But before he would dispose " of the residue, he said, he would acquaint the King with " the case, and the value of the estate; which appeared to be " 400*l. per annum* at least, to have his directions, how the dis- " position of this general charity should be, and that to be " confirmed by the decree of this Court. And afterwards " the King directed, it should go to the maintenance of the " mathematical scholars in Christ's Hospital, whom the King " had lately appointed to be brought up there in order to be " instructed in the art of navigation; which, *ut audivi*, was " accordingly confirmed by the decree of this Court."

The authority of this case is strongly confirmed in *The Attorney-General* v. *Syderfin;* and upon inquiry at Christ's Hospital I have been furnished with the original papers in that cause; which furnish an answer to the objection stated
[71] to the authority of that case. It appears from the papers, that previously to the decree the King's sign manual had been obtained; and was brought into Court; and the decree was made according to that; and that, it is intimated at the Bar, was a proceeding not fit for a Court of Justice. If that observation could not be displaced otherwise, it would be displaced sufficiently for this purpose by this; that, however the cause came into Court, the authority of it has been universally recognised ever since. But that observation founds no objection to the propriety of the proceeding; for the case was a devise, subject to a sum of 1000*l.* for such charitable uses as the devisor had by a paper directed. The person, to whom the estate was given so charged, had taken to the enjoyment of the estate under the will, as far as it was beneficial to himself; and had, as is frequent in such cases, taken no notice of the fact, that there was a charge for the benefit of the charity. The Hospital found out, that there was such a will: and if so, the money charge, as the law then stood, was clearly at the disposal of the King. It is perfectly familiar, that where an interest of such a kind is given to charity, or, where there is an escheat for want of heirs, and the fact is not communicated, it is usual to petition the King; stating that there is such an interest; and praying some reward upon the ground of the discovery, if it can be made out. That is familiar practice, whether well or ill founded. It occurred in my experience, when Solicitor

and Attorney-General, in several instances as to escheat; and the ordinary rule upon an escheat is for the Crown to give a lease, as good a lease as it can give, to the person making the discovery. This case originated in the discovery made by the Hospital of the charitable disposition; and a petition was presented upon that ground. I have the petition, with the opinion of the *Attorney-General* of that day upon it; and in consequence of that he filed his information. That produced * the cause, which is very accurately reported in *Vernon* upon a comparison with the papers.

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The ordinary rule is, for the Crown to give a lease to the party discovering an escheat.

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The answer expressly insists upon that point, that if any writing was at any time made by the testator, it was afterwards revoked and cancelled; and that the Court would have no authority to insist, either that it was in its own disposal, or that it was in the disposal of the Crown, without an inquiry upon the point, that that paper was revoked; and that it was not unreasonable, that there should be some inquiry, a reason is given, that made the suggestion of revocation not improbable; that subsequent to the making of this will he had charged several great sums of money upon his land; and that the whole estate would scarce amount to answer all the charges thereon.

After the answer the case was again laid before the *Attorney-General* for his opinion; regard being had to the circumstances disclosed by the answer. His opinion is, that the executors ought to be made parties; but that then, notwithstanding the circumstances in the answer, they may, when the executors are made parties, go to a hearing. The effect of the reasoning at the hearing was, according to the book, this: the *Lord Keeper* argues, that the charity exists, though the writing was not to be found; whereas the question was, whether the charity was not destroyed, because the writing was not to be found; and the idea of indemnity against the paper being found, and expressing different charitable uses, is kept up through the whole. How it was collected, that it was intended to be a permanent charity, it is very difficult to say; the writing not appearing.

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There is a material difference between this case and *Frier* v. *Peacock;* for in that the will itself, devoting the property to charity, was producible.

It appears from the papers, that this decree was carried into actual execution; the papers containing the evidence of payment of the money, a copy of the receipt, and a deduction of the costs of the suit, beginning with the first application, and including all the proceedings, which are very reasonable; not exceeding 34*l.* Whether the decree proceeds upon good reasoning, or upon that which fair reasoning might displace, it asserts, that where it is altogether uncertain and indefinite, it is in the disposal of the King.

With regard to the doctrine here laid down, there is a very strong declaration in *Freeman:* (a)

(a) *Freem.* 330.

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"It was said, and not denied, that if a man deviseth a sum "of money to such charitable uses as he shall direct by a "codicil to be annexed to his will, or by a note in writing, "and afterwards leaves no direction, neither by note, nor co- "dicil, the Court of Chancery hath power to dispose of it to "such charitable uses as the Court shall think fit."

That *dictum* seems very much at variance with one way of interpreting *Wheeler* v. *Sheer.*(b) It should seem, that *The Attorney-General* v. *Syderfin* might have proceeded upon this principle; that the testator having once given to charitable uses, if it was not shown that he had revoked that gift, his general purpose was charity, and should be enforced; though you could not show what was the use: a very strong proposition. It goes on thus:

[74] "And so it was held in the case of *Mr. Syderfin's* will and "the case of one *Jones*: but if the will points at any particular "charity, as for maintenance of a school-master or poor wi- "dows, then the Court of Chancery ought not to direct it to "any other purpose but such as is pointed at by the will."

I mark this; because it is not immaterial as to some of the late doctrine of the Court.

"As if a devise should be for such school as he should ap- "point, and appoints none, the Court may apply it for what "school they please: but for no other purpose than a school; "although it may be for what school the Court thinks fit."

If there is any authority in this case, it goes a length, that leads one a little to doubt it; that if the disposition is for such general charitable use as the testator shall appoint, and he does not appoint, that is a gift in *præsenti*, to operate at his death, to give to charity: reserving only to himself to particularize *in futuro*, by what mode that general charitable purpose shall be executed; and illustrating it by that case of such school as the testator shall appoint; that that will authorize the Court to say, he meant a school, though with that discretion; and that he meant only to reserve to himself the opportunity of selecting some school. That was going a great length.

In *Clifford* v. *Francis*, (a) this doctrine is laid down; that when money is given to a charity, without expressing what charity, there the King is the disposer of the charity; and a bill ought to be preferred in the *Attorney-General's* name. [75] I cite this to show, that it contains a doctrine precisely the same as *The Attorney-General* v. *Syderfin*, and *The Attorney-General* v. *Matthews*. So those three cases seem to have established at the year 1679, that the doctrine of this Court was, that where the property was not vested in trustees, and the gift was to charity generally, not to be ascertained by the act of individuals referred to, the charity was to be disposed of, not by a scheme before the Master, but by the King, the disposer of such charities in his character of *Parens Patriæ*.

(b) *Mos.* 288. 301. (a) *Freem.* 330.

In *The Attorney-General* v. *Baxter*, (a) in 1684, it was alleged that the charity was against law; and therefore the right of applying this money was in the King. That doctrine is recognised in other cases; that if the gift denotes a charitable intention, but the object, to which the exercise of it is applied, is against the policy of the law, the Court would lay hold of the charitable intention; and execute it for the purpose of establishing some charity, agreeable to the law, in the room of that contrary to it. That is according to *De Costa* v. *De Pas*, (b) which I shall mention from Lord *Hardwicke's* notes; where you will see the ground, upon which this decree was reversed. If the particular ground, upon which it was reversed, had not occurred, this case would prove, that the intention being charity, his primary purpose would be held charitable; and they would not suppose, he would relinquish that, because the secondary purpose could not be answered; but would uphold the general primary purpose by giving that which the testator had so given to dissenting ministers, to *Chelsea College;* and certainly in *De Costa* v. *De Pas* Lord *Hardwicke* followed that. This sort of decision [76] seems to have been followed in another case, in 1679, (a) shortly mentioned in *Vernon;* (b) in which case it is said, in case a legacy is given to a superstitious purpose, or a mistaken religious purpose, the Court will not apply it to that; but will act upon the supposed intention for charity; and give it to a real religious purpose; as where charity is intended, but a mistaken charity: thus 10*l.* a-year for a weekly sermon upon *Saturday*, at *St. Alban's;* the preacher to be chosen by the majority of the inhabitants. That they thought a mistaken charity, that it was quite wild, that the preacher should be chosen by the majority; but still the purpose was charity; and they directed the 10*l.* to be paid to a catechist to preach weekly at *St. Alban's* on *Saturday*, being named by the bishop of the diocese. *The Attorney-General* v. *Baxter* is mentioned in Lord *Hardwicke's* note-book thus:

"The case of *Mr. Baxter* upon *Mayo's* will: the decree re-"versed; not upon any thing contradicting the general prin-"ciple reported to have been stated, but because really a "legacy to sixty particular ejected ministers to be named by "*Baxter*, and as if a legacy to those sixty individuals."

Lord *Hardwicke* therefore affirms the principle; but asserts, that it was ill applied in the construction of that will. *De Costa* v. *De Pas* came on in 1754. The report of that case is not very accurate; attending to the law of the country with regard to superstitious uses. Lord *Hardwicke* says, "I held "the donation in this case to be a charitable use; and that it "was unlawful and void; that the power of appointing and "directing to what charitable use it should be applied, was "in the Crown; and I recommended to the *Attorney-General* [77]

(a) 1 *Vern.* 248. (b) *Amb.* 228.
(a) p 76 *Attorney-General* v. *Combe*, 2 Ch. Ca. 18.
(b) *Attorney-General* v. *Guise*, 2 *Vern.* 266.

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" to apply to the King for his sign manual, to direct, to what " charitable use it should be applied."

The ground therefore does not connect itself with that *dictum* in *Ambler* as to a superstitious use. Lord *Hardwicke* held it void; but that it was given to a charitable use; and being so given, though to one unlawful and void, the Crown had the right: which must be upon this principle; that the testator's intention of charity was the principal intention; that he meant at all events some charity; that his unlawful purpose was a mode of disappointing it; and the mode therefore was out of the question; and the intention should be carried into effect by another mode. These cases do not appear necessarily to trench upon some of the later authorities in this Court, which, however, I admit, are not very reconcileable with some others; particularly *The Attorney-General* v. *Bowyer;* and Lord Chief Justice *Wilmot* goes very fully into the doctrine in his advice to Lord *Camden.* But these cases do not necessarily trench upon the later authorities. I allude to the case of *Wheatley Church*, *(a)* and some of the cases before Mr. *Justice Buller* and Lord *Alvanley*; where the *Cy pres* doctrine is said to have been formerly carried to a monstrous length, in later cases much restrained; for in those cases the charity was given to a lawful, not an unlawful use: but from circumstances it could not be applied; and it was held, that being a charitable intention, and lawful, if you could not apply it to that, you should not to another lawful use, inferring a general intention of charity. I do not go through all the cases; viz. *Baylis* v. *The* [78] *Attorney-General*, *(b)* or the case *(c)* where the gift was to such Lying-in-Hospital as the executor should appoint; and in the former a blank, left for the name of the person, according to whose will the 200*l.* was given to *Bread Street Ward*, was not filled up; and in the latter, the executor to appoint the Lying-in-Hospital was not named; or, where several particular charities are named; and the distribution is given to a person, who dies before the testator; for they are not applicable to a case, where it is given by the general term "charity." Those cases are decided upon principles, which both Lord *Thurlow*, and Mr. *Mansfield*, in the argument of *White* v. *White*, state very fully to have gone upon this; and, considering the principle, those decisions have not gone far in disappointing the next of kin; only holding, that the testator having expressly said, he meant to give to *Bread Street Ward*, to some Lying-in-Hospital, or to some of the particular charities expressly named, the selection of the objects in some cases, in others the mode, being left to individuals, the testator had gone a length beyond the testators in cases of the former class; not having left it to that person to say, what charity; but having decided that himself; leaving him only the selection of some objects by the determination of the mode, by which some individuals selected by him, should

(a) The Attorney-General v. *The Bishop of Oxford.* See *Corbyn* v. *French*, *ante*, vol. iv. 418. *(b)* 2 *Atk.* 239. *(c) White* v. *White*, 1 *Bro. C. C.* 12.

fake. In *White* v. *White*, *Mr. Mansfield* says, that the obliteration of the name shall not defeat the intent, so as to prevent the money from going to some one or all the Lying-in-hospitals: it is impossible it should go, as it was left; but under all the cases, the Court will stand in the executor's place; and all the rules show great latitude and liberality of construction, &c.; and Lord Chief Justice *Wilmot* doubts extremely whether the Court ever should have gone the length it has: but says, the Court is now bound by precedent. Lord *Thurlow* in his judgment, says, it has been argued, that the Court has great extent of jurisdiction in making legacies certain, which [79] were before uncertain. That observation is confined to these charitable legacies. Then referring to *The Attorney-General* v. *Syderfin* he does not take notice of the circumstance, that though there had been an appointment, it might have been revoked; and the non-existence of it was *primâ facie* evidence of that fact, that it was revoked. There was nothing more particular in the charity in *White* v. *White*, than that it was to be to some Lying-in-hospital. *The Attorney-General* v. *Hickman (a)* is referred to by Lord *Thurlow;* which case is held very high authority by Lord Chief Justice *Wilmot* in *The Attorney-General* v. *Bowyer*. I doubt very much, whether the decree in *Wheeler* v. *Sheer (b)* was made upon the principle stated by Lord *Thurlow*. If it was determined upon that ground, that referring to a future codicil the testator had not by his will determined, that he had as yet any charitable purpose, it is directly against some of the passages in *Freeman*, which I have stated. That doubt I express upon this ground; that there were two codicils; and in the latter the testator does not repeat, that he gave to such charitable uses, but for the uses, trusts, and purposes, generally. That latter codicil therefore seems in this respect something like a revocation of the will, as to the charitable purpose being dropt by the codicil, and the general use and purpose only mentioned; and that reduces the case precisely to what it would have been, if by the will only general uses, intents, and purposes, had been mentioned, and not charitable purposes. The Court does not go upon that ground, that Lord *Thurlow* intimates, that they would lay hold of the testator's reference to a future act, as showing, that his intention for charity was not even inchoate at the date of the will; and therefore determined in favour of the next of kin.

The Attorney-General v. *Hickman (a)* is very strong; and [80] forms the foundation of a great deal of what Lord Chief Justice *Wilmot* says. As that case is reported in Equity Cases Abridged, and *The Attorney-General* v. *Doyley*, *(b)* as there reported, are agreeable to the Register's book. In the former it is given in a method the testator will not prescribe; but

(a) 2 *Eq. Ca. Ab.* 193. (b) *Mos.* 288. 301.
(a) p. 80. 2 *Eq. Ca. Ab.* 193. (b) 2 *Eq. Ca. Abr.* 194. 4 *Vin.* 485.

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leaving it to another person, requiring him to take the advice of two other persons. I take it, this case goes a very considerable length, authorized by preceding determinations for charity, as particularly favoured; for what any one was to take, what charity, and by what mode, all this is left totally uncertain by the testator; and he had taken no means to ascertain it, but what had altogether failed by the death of all those persons; and yet the Court said, they would intrust themselves with the discretion; which was left personally to others, upon the ground, that charity was the essence and substance; and the mode only a shadow. The distinction is very nice between the words used in that case, and a gift to such charities as A, B, and C, should appoint; if you do not hold, that in the latter instance the same doctrine applies: this being clear, that the generality of the term "Charity," is no objection to a legacy to charity; and therefore there is no ground to say, though the discretion fails in the one case, it shall not in the other; and all the cases show, that charity in general is sufficient. By another account of this case from a manuscript note, this is represented as falling from Lord *King*.

"The substance of the charity remains, notwithstanding "the death of the trustees before the testator; and though at "law it is a lapsed legacy, yet in equity it is subsisting; and [81] "here is a sufficient certainty of the testator's intention to "revive it. The intention therefore of the party is sufficient-"ly manifested, that this charity should continue within "43 *Eliz.* c. 4."

This case was followed by *The Attorney-General* v. *Doyley;* in which the Court said, they would cut the difficulty by a sort of technical rule, that equality is equity; and they divided the subject into two moieties; giving one moiety to the relations, and the other to such charitable uses as the Court itself should appoint. These cases are pretty fully recognised in Lord Chief Justice *Wilmot's* judgment; which recognises the doctrine of the Court; that it sees a general intention for charity in these cases. *(a)* It is very difficult, I think, seeing that intention to build a Jewish synagogue, to discover an intention to build a Foundling hospital, rather than that the money should not be applied: but the Court has said so always.

He states *De Costa* v. *De Pas;* distinguishing that, as it was a charitable bequest in the intention of the testator, (and I repeat, that I should not have discovered that,) though of such a nature as not to be permitted; that it was not a superstitious use given to the Crown for its own use; which corrects that *dictum* in *Ambler*. Lord Chief Justice *Wilmot* follows the former cases. He does not say, what would become of the fund, if the purpose is legal, but it cannot be applied to that purpose: but he says, if the purpose is unlawful, these cases au-

(a) The Lord Chancellor read several passages from Lord Chief Justice *Wilmot's* argument: which has been since printed in his Reports.

thorize the Court to say, it should be applied to some other charitable purpose; and then it devolves upon the Crown as *Parens Patriæ*. I do not state the case of *Wheatley Church*, and some of Lord *Alvanley's* later cases, adopting that opinion of Lord *Kenyon*, that if there is a legal purpose, * which from circumstances cannot be executed, this Court will not carry it into execution *Cy pres* by directing it to any other purpose. Mr. Justice *Buller* also held the same doctrine; and that applies to this sort of case; that, where it would be a good personal gift to persons in an Hospital, &c. but cannot on account of the Statute of Mortmain or otherwise take place; if it cannot be applied in the mode directed, it must fail altogether. All the cases prove, that, where the substantial intention is charity, though the mode, by which it is to be executed, fails by accident or other circumstances, the Court will find some means of effectuating that general intention.

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In this case it is not to be argued merely upon *Vaston's* death. I agree with Lord *Thurlow*, that makes no difference; for the question is, what the testatrix must be taken to have meant, if she had died immediately after the will was executed; and it is infinitely difficult to contend, that the Court can construe it otherwise, because he died in her life, than if he had outlived her. It is said, if he had, he would have had all his life to select the charities. I doubt that extremely. It is assuming the question. The Court at least would call upon him to act. *The Attorney-General* v. *Glegg* (a) proves that. The question would arise exactly in the same way; for, if he had survived her, and had addressed himself to the execution of the trust, and had died suddenly, while about it, and before he had completed it, the mode would have failed precisely as by his death before her; for unless the means, by which it is to be executed, were effectuated by his act, the circumstance of his dying before her can make no difference as to the question, whether the Court will supply other means. The question results upon the whole, did she intend he should be a trustee for charity? If these authorities are to stand, though I had for ten years a strong persuasion upon this will, that she meant, the objects should be selected by him only, I must check such conjectures by attention to the rules upon which the Court acts with regard to charities; and I am reluctantly driven to say, there is no substantial difference between these words, in which she has bequeathed to *Vaston*, to dispose in such charities as he shall think proper, and the words, in which it was expressed in *The Attorney-General* v. *Hickman*. Those cases call upon me to say, the general intention of this testatrix, who seems to have been saturated and satiated with the idea of charity, and yet not to have had mind enough herself to determine upon the particular objects, was to devote her property to charity, and according to these precedents *Vaston* was only the means and instrument, by which that general in-

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(a) 1 *Atk*. 356. *Amb*. 584.

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tention was to be executed; and therefore this Court will carry that general intention into effect.

The next question, by what means that is to be done, is a most difficult question; for it being established, that, where, money is given to charity generally and indefinitely, without trustees or objects selected, the King, as *Parens Patriæ*, is the constitutional trustee, it is very difficult to raise a solid distinction between an original gift absolutely indefinite and without qualification, and a case, in which by matter *ex post facto*, the gift stands before the Court in consequence of that accident, as if it had been originally given indefinitely, without any means for carrying it into execution prescribed. All I can say upon it is, I do not know, what doctrine could be laid down, that would not be met by some authority upon this point; whether the proposition is, that the Crown is to dispose of it, or the Master by a scheme. In *Cook* v. *Duckenfield*(a) it appears by the Register's book to have been executed by a scheme before the Master. There the means prescribed by the testator could not be followed; and the Court took upon itself to execute it by a scheme before the Master: not, as represented in the report of *The Attorney-General* v. *Herrick*, by sign manual. *The Attorney-General* v. *Herrick*(a) was a case of an estate vested in trustees. They were to sell, receive the money, and apply it to some particular purposes, and then to charitable uses. In the natural construction you would say, they were to determine, what charitable uses, under the ordinary control of this Court. *Cook* v. *Duckenfield* is there referred to; and another case, in 1743, is there stated as from Lord *Hardwicke's* notes; that there being no particular charity, his Majesty may dispose of the 400*l*. to such charity as he shall think fit. I cannot collect, what that case was: nor can I find the passage referred to in Lord *Hardwicke's* notes. The case of *De Costa* v. *De Pas* is by no means given in the words of Lord *Hardwicke's* notes, as it there purports to be. *The Attorney-General* v. *Peacock* is mentioned; which, I have no doubt from the date, was the case upon *Frier's* will. It was difficult to say there, the trustees were to determine, what poor people were to take: recollecting, what the law did upon uses so expressed, you cannot well call them trustees for the poor. The Lord Chancellor concluded, that he would apply to his Majesty, as Lord *Nottingham* did in the case of *The Attorney-General* v. *Peacock*. The difficulty upon this case is, that it seems a devise to trustees still existing; and that the meaning was, that the distribution should be by them, if they thought proper: but Lord *Apsley* thought otherwise; and that property was disposed of, as I have stated. In the other cases, where all the trustees are dead, in others, where some of them are dead, the discretion being wholly or partly gone, or, where the trustees surviving would not act, or where some would and others would not, yet the Court in a great number, if not in all those

[84] [85]

(a) 2 *Atk*. 562. 567. Reg. Book, A. 1743. 283. (a) p. 84. *Amb*. 712.

instances, did by a scheme distribute the fund. The run therefore of the cases with the exception of the last, that have occurred, rather import, that, where originally a trust is created for the distribution of a charity, and the trust is not carried into execution, because it was originally a trust, and not in a strict sense, a general, indefinite gift to charity, general and undefined, or to the poor in general, the Court would execute it by a scheme; and in the case I put of *Vaston's* surviving the testatrix, and partly executing, and dying, before he had completed the execution, the question would come to this, whether the Court should supply the defect; or, on the other hand, whether the Court would carry on that, which it might have taken into its own hands, if a bill had been filed against *Vaston;* and he had begun to execute in consequence, and had not lived to finish it: the question there would have arisen, whether the Court should take it upon itself, as it would, controlling his discretion, if he had lived; and whether the Court might not have gone on itself to select the objects. Lord *Thurlow* seems to have thought there was a ground for distinguishing it. There is a singular expression, used by him in one of the cases; "the property becoming "*fiscal*." Yet, he seems to have thought, that if *Vaston* in the execution of his duty according to a sound construction of his right had excluded certain persons, that would have been controlled by this Court. I allude here to the recommendation about poor clergymen. If the question was drily upon this, whether that makes him a trustee for poor clergymen, it is very difficult to say, it does in a strict sense; for if words of recommendation are not to be taken to be imperative, * unless the objects and the subject are certain, (a) it is difficult to say, that if recommendation is mounted upon a gift purely discretional, where the subject is wholly uncertain, that shall be a trust. Lord *Thurlow* thought it necessary for him to apply the strict question, trust or no trust; but upon the principle, very strongly stated in *The Attorney-General* v. *Glegg*, that, however extensive, this court would control the discretion. Lord *Thurlow* seems to think, a due exercise of the discretion would entitle the Court to call upon him to attend to the recommendation; and accordingly in the decree directs the scheme to have regard to that recommendation; and if *Vaston* had been alive, I think he would have directed *Vaston* to have the same regard; and I doubt, whether, if the decree upon the principles attaching to charitable uses must have called upon the trustees, it can be said, that, because the trustee is dead, the Court is not to make a decree, ordering such direction; for no such order could be given to the King, executing by sign manual.

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Words of recommendation not considered imperative, unless the objects and subjects are certain.

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Therefore, I rather think, the decree is right. I have conversed with many persons upon it. I have great difficulty in my own mind; and have found great difficulty in the mind of

(a) *Malim* v. *Keighley, ante*, vol. ii. 333. 529. {and note.}

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every person I have consulted: but the general principle thought most reconcileable to the cases is, that, where there is a general indefinite purpose, not fixing itself upon any object, as this in a degree does, the disposition is in the King by sign manual: but where the execution is to be by a trustee with general or some objects pointed out, there the Court will take the administration of the trust. But it must be recollected, that I am called upon to reverse the decree of a predecessor, and of a predecessor, who all the reports inform us,
[87] had great occasion to consider this subject. I should hesitate with reference to that circumstance: but, where authority meets authority, and precedent clashes with precedent, I doubt, whether I could make a decree more satisfactory to my own mind than that, which has been made; and I have the less difficulty, from the doctrine hinted at in *The Attorney-General* v. *Matthews*, as the doctrine of the constitution of the country, and this is also the language of Lord Chief Justice *Wilmot*, that, whether this Court, or the King by sign manual, executes it, the constitution finds a trustee in the Court, or the King, to act in the one case as the Court would act; and, considering the King, *Parens Patriæ*, as one, who would act, exercising a discretion with reference to the intention. Therefore there would not be, as there ought not, any difference in the execution; and I am delivered from the anxiety I should feel from the consideration, that I should be taking away from the natural expectations of those, whose disappointment I regret as much as any one: for those, whose duty it would be to advise the Crown, would think themselves equally bound to attend to the particular object. Upon this ground I am of opinion the decree is right; at least so far, that I am not disposed to do that in effect, which no Judge will in terms, take upon himself to reverse decisions, that have been acted upon for centuries. If this decision is wrong, and if this strange doctrine, as I should have called it, if I had sat here two centuries ago, that you can find a charitable purpose in a purpose that is to fail altogether, can be shaken, I can do no more than allow them to go to a higher tribunal; and I have some consolation from the precedent given by Lord *Thurlow*, and the recommendation of Lord *Rosslyn* to rehear the cause, in being enable to say, the experiment should be made without expense to the parties.

[88] I support the decree therefore; giving the costs of all parties, as between attorney and client, out of the fund.

1802.



May 12.

Ex parte SHORLAND.

A mere gift of money by the bankrupt to his son not within the statute. 1 *Jam. I. c.* 15.

THE prayer of this petition was, that the petitioner may be at liberty to call a meeting of the commissioners under a commission of bankruptcy against *Thomas Baker* and *John Shorland*, for the purpose of proving a debt of 1058*l.* 13*s.* 9*d.*; and that the Commissioners may be directed to admit such proof.

The debt was claimed by the petitioner, as the balance due to him in respect of his acceptances for the accommodation of the Bankrupts. About three years before the commencement of the partnership between the bankrupts, *Shorland* advanced to the petitioner, who is his son, the sum of 900*l.* without taking any security; and the petition suggested as one ground, upon which the proof was rejected, that the commissioners supposed, that sum was advanced by way of loan; or that the bankrupt was at the time in insolvent circumstances; and it was a fraud upon his creditors. The petition insisting on the contrary, that this advancement was intended as a gift to the petitioner by way of advancement in life; and the petitioner joined in a bond for securing part of the money, which was borrowed, and that bond is unpaid; and that the bankrupt was solvent at the time.

Mr. Romilly, and Mr. Cooke, for the Assignees, insisted, that this was within the Statute of *James I;* (a) being a voluntary gift, not upon the marriage of a child; and mentioned *Fryer* v. *Flood.* (a) [89]

Mr. Johnson, in support of the Petition, said, it would be very hard to consider such a gift as within the Statute. In that way it would extend to any gift to a son at school, or college, to pay his debts, &c.

Lord CHANCELLOR.—The case of *Fryer* v. *Flood* came within the words "cause to be procured;" but this is a mere gift of money, and not within the act, unless brought within it by some procurement, &c.

Refer it back to the Commissioners; with a direction, if they disallow this claim, to state the ground specially.

(a) Stat. 1 *Jam. I. c.* 15. *s.* 5.

(a) p. 89. 1 *Bro. C. C.* 160.

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May 18, 19.

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General residuary bequest, including a leasehold farm, with the stock, to be converted into money as soon as conveniently may be, upon trust to pay the interest, &c for life, and as to the capital for the children. The stock being considerably increased between the death in *April* and the sale at *Michaelmas*, it was decreed, that the conversion was in a reasonable time; and the party entitled for life should have interest from the conversion; and as to premises, that from a defect of title could not be sold, that, being for the interest of all, that they should not be sold, a value should be set upon them, to carry interest at 4 *per cent.* from the death.

THOMAS DAWSON, by his will, dated the 7th of *January*, 1799, after some legacies gave and bequeathed all the rest, residue, and remainder, of his goods, chattels, monies, securities for money in the public stocks or funds, or in private hands, notes, bonds, bills, leasehold and other estates, and all other his effects whatsoever and wheresoever, that he should be possessed of, interested in, and entitled unto, at the time of his *decease, and not hereinbefore otherwise disposed of, (subject nevertheless to the payment of such just debts as he might owe at his decease and the several legacies aforesaid,) to his executors, their executors, &c.; upon trust that they shall and do, as soon as conveniently may be after his decease, make sale and absolutely dispose of and convert into ready money all such parts thereof as shall not consist of money or of monies already invested by him in the public funds; and upon further trust, that they shall place out and invest all such sum and sums of money as shall arise by such sale and conversion into money as aforesaid; and also all such parts of the said residue of his estate and effects as shall consist of ready money, or be hereafter got in and received, in the public funds or upon real or government securities, at interest, in his or their own name or names as to his said executors or trustees shall seem meet; and he directed, that they should stand possessed of as well the monies by him already invested, as aforesaid, as the monies so to be invested, and the interest and dividends, and the funds and securities, wherein the same shall be so invested, upon trust as to one equal moiety of the said funds or securities, already, and also upon which such monies, as aforesaid, shall he invested or placed out, and the interest, dividends, and proceeds, which shall arise, or become due and payable, for or in respect of the same, to pay, &c. the clear yearly interest, dividends, and proceeds, to his daughter *Jenny Davies* and her assigns for her life; and from and after her decease that they shall pay, apply, and dispose of, the said moiety of all the said stocks and securities, &c. for the use and benefit of all and every the child and children of *Jenny Davies*, who are or shall attain twenty-one, equally, if more than one.

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The testator made a similar disposition of the other moiety of the funds, in favour of his other daughter, *Lætitia Gibson*, and her children; and directed, that, if his said daughters, or either of them, should die without leaving any child, who should attain twenty-one, the trustees should stand possessed of the said moiety or share of such of his said daughters as should so die in the said monies, stocks, funds, securities, and premises, upon the same trusts, &c. for the benefit of his surviving daughter and her issue as were expressed concerning her original moiety in the said monies, stocks, funds, securities, and premises aforesaid.

The testator died on the 14th of *April*, 1799. Part of his personal estate consisted of a considerable leasehold estate, of 450 acres, in *Essex*, held for a term of 39 years, at a rent of 315*l.* a year; part of which, about 210 acres, were let by the testator at annual rents, amounting to 407*l.* 12*s.* 6*d.*; and the remainder, about 240 acres, he held in hand. Upon that part of the farm, which he occupied, there was a considerable live stock. *Edward Gibson* one of the executors, managed the farm from the death of the testator till *Michaelmas* following; when the whole farm was sold by the executors with all the live and dead stock and crops; and the money produced by the sale was invested in the funds. Between the testator's death and the sale a considerable profit was produced, not only in respect of the crops, but by the increase of calves, lambs, and pigs, and the improved state of the cattle, which at the death of the testator were in bad condition from the effect of the preceding winter. Some other leasehold estates, of which the testator was possessed could not be sold on account of defects in the title. The clear residue was very considerable.

The bill was filed by *Gibson* and his wife for an account of the personal estate as it stood at the death of the testator; and [92] praying, that a value may be set on the farming-stock, cattle, growing crops, and leasehold estates as they were on the 14th of *April*, 1799; that the clear residue on that day may be ascertained; an account of the produce and profits arising from the farm, and the increase of cattle and rent of the leasehold estates, from that time till the sale; that the clear residue of the personal estate, as it stood at the death of the testator, may be invested in the 3 *per cents.* Bank Annuities, &c. and that what shall appear to have arisen from the produce and profits of the said farm and increase of cattle and by the rents received from the 14th of *April*, 1799, may be declared to belong, and be paid to *Jenny Davies*, and to the plaintiff *Edward Gibson*, in right of his wife, in equal moieties; or that a compensation may be made for the delay of the sale.

The other executors by their answer stated, that the sale was postponed to *Michaelmas*, as the most convenient time and most for the benefit of the parties interested, with the concurrence of the plaintiff.

Mr. Romilly, and Mr. Cooke, for the Plaintiffs.—The question is, whether the persons entitled for life are to receive the whole profit arisen between the period of the testator's death and the sale, which is considerable, though the delay was short, as so much interest or profit; or, if not entitled to the whole, what proportion they are to have; how much is to be considered increase of capital, and how much interest. It cannot possibly be said, they are not entitled to any part. The will directs the sale to take place as soon as conveniently may be; and the daughters are to receive the whole interest, dividends, and proceeds. The sale could not take place the very day after the death. It cannot be argued, that the daughters are not to receive any profit, till the whole is invested in

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the funds, and dividends are received; for then the executors might delay the formation of that fund intended for maintenance. The most rational construction is, that the persons entitled for life should receive the whole of that increase as interest and profit; as they would, if the property consisted of debts, or any other subject yielding annual profit. If the amount of the profit produced makes a difference, it will create great uncertainty. The testator meant a provision for his two daughters, to commence at his death; are they to be without any provision so long as it is thought advantageous to defer the sale? Great part of this property he well knew was more productive, than if the value of it was laid out at interest. The person entitled for life is to have the produce of the thing given, whether arising as interest or in any other shape: whether, for instance, dividend or interest of a mortgage: whatever is the actual produce. Another view of the case, answering in some degree the objection, that a leasehold estate is an interest wearing out, is to take the produce of the farm, for the whole year, and deducting the expense, to ascertain the clear profit, and then consider it from the death as capital, and the subsequent profit as belonging to the tenant for life. That will answer the justice of the case. In *Conolly* v. *Lord Howe (a)* Lord *Rosslyn* gave the tenant for life the whole; though some part of the property consisted of Long and Short Annuities.

Mr. Mansfield, and Mr. Wooddeson, for the Defendants, the children: Mr. Richards, for the other Executors.—That cause is now before your Lordship for a re-hearing; and Lord *Alvanley* has expressed his opinion against that decree. There is no instance of such an account. It was agreed on all sides, that [94] it would be best to stay till *Michaelmas;* and no objection was made: no desire expressed for an immediate sale. The sale was therefore as soon as conveniently could be. The testator could not mean the day after his death. By what rule or measure can the plaintiffs have any thing? What time can be said to be reasonable for disposing of all articles of this nature? Such an account would be desired in every case. The rule in *Maxwell* v. *Wettenhall (a)* as to interest upon legacies has long prevailed; and was adopted by the Statute of Distributions. *(b)* This must happen in every instance; as, where the subject is a trade: the goods will sell to most advantage in the spring: so in every instance of a gentleman or a farmer having land in his hands: yet no case can be found: nor is there any instance of special directions for this purpose.

Lord CHANCELLOR.—There must have been cases upon this subject; and I do not recollect any special directions. With respect to the live stock it is not all clear gain. The increase of the animals is contributed at the expense of the estate, upon which they live. A man would buy a sheep or a

(a) See the decision of that cause upon the re-hearing, *Howe* v. *Earl Dartmouth, post.* {137.}

(a) p. 94. 2 *P. Will.* 26.

(b) 22 and 23 *Ch. II.* c. 10. 29 *Ch. II.* c. 3.

cow upon speculation of improvement in their condition, and by their producing lambs or calves, and the expense between *April* and *Michaelmas*. The difference to be taken would be, not between the price at *April* and at *Michaelmas*, but with reference to the profit made by keeping them for that period, and the sum, that would have been given in *April* by a man, who looked to that profit. The question is, whether the Court must not put upon the direction, to sell as soon as conveniently can be, some practical construction, that five times in ten will do justice, and five times will not, or whether there may be found some practical rule in the circumstances of each case, that will do justice. As in *Sitwell* v. *Bernard*, (a) I [95] must cut the difficulty. In that case the estates were subject to encumbrances. One estate was covered by a mortgage, requiring a suit: to another no title could be made. If I had picked out particular parcels, and determined, how soon each might be sold as soon as conveniently could be, I must have applied a different rule to each parcel. So, as to the money: some was in the *East Indies*: some was due from persons, who would pay: some from persons, who would not. But I was obliged to take some rule; which, if it could be avoided, would, I admit, be wrong; and I took the end of a year after the death. So, in the common case of debts and legacies, the same rule is applied to cases, where the debts cannot be arranged for ten years, and where there are no debts, and the property is immediately tangible in the funds. If you contend, not for a general rule, but for some rule resulting out of the particular circumstances of this case, you must go this length; that, if the cows calved, and the ewes lambed, between the testator's death and his funeral, the persons entitled for life must have the whole; or inform me, how I am to take the proportion for the three days that they must be upon the farm. Has the Court ever adopted in the case of a testator having a leasehold estate in his own occupation the rule suggested, ascertaining the clear profit, and making a rest at the death? Every such case is an authority to the contrary. The point is, what is advantageous, not to the sole owner of the property, but to all persons interested; and as to that regard must be had to what in such cases is practicable. The course is an account, and the tenant for life to take the interest from the end of the year. In every case it is hard, that he should lose the interest for that year. According to this there must be a special direction in every case where there is leasehold [96] property; and he would have the whole profit for that year. If leasehold estate is given *eo nomine* to *A.*; remainder to *B.* it must be enjoyed as given: but, if it is to be converted with all convenient speed, those words never require it to be sold the very next day. Where those words occur as to legacies, interest is never given till the end of the year. The Court is obliged to take a general rule; as it is impossible to make the

(a) *Ante*, vol. vi. 520.

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inquiry in every particular case. Suppose the testator directed his executor to convert the property with all convenient speed, to pay certain legacies; and then gave the interest of the residue for life; remainder over: the legatees could make no complaint till the end of a year; and yet their claim would be paramount that of the tenant for life. If an annuity is given, the first payment is paid at the end of the year from the death: but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy; and till the legacy is payable, there is no fund to produce interest. I remember, when it was not clear in the case of the annuity; though it is so now certainly. As to legacies, there is no other direction given now than to compute interest from the end of a year from the death; except where the will directs any other time.

Distinction between an annuity and a legacy; the former commences from the death; and the first payment is due at the end of the year: a legacy, generally does not begin to carry interest till the end of the year.

Mr. Romilly, in Reply.—There is a difficulty still as to the leasehold houses that cannot be sold. That at least makes a bill necessary. It was for the benefit of all parties, that this property should be sold, when it was sold. As to the case of a trade, executors never venture to carry on the business, till it is sold. The business is stopped immediately. The distinction between an annuity and a legacy is very nice. Where the fund is productive, and under some other circumstances, interest commences from the death: *Maxwell* v. *Wettenhall.* [97] *Beckford* v. *Tobin.* (a) At least they have a right to interest from the death of the testator.

May 19.

Lord CHANCELLOR.—The utmost that can be contended by the plaintiffs is, that what is directed to be done shall be considered as done. They can only therefore claim interest upon the capital, as it was at the death. But here the capital is much increased. When a testator gives interest of a fund, to be created by a sale as soon as conveniently can be, he means only the interest from the time the property can conveniently be sold. The whole practice of the Court is against such special directions as to the value at the time of the death. The old authorities say, that if the testator's fund is carrying interest, the legacy shall: but is not that exploded now by every day's practice? Suppose him to have stock only, no other property: yet now no interest is given upon legacies till the end of a year. As to the case of an annuity, that I mentioned yesterday, I find by a manuscript note, that I inquired from Baron *Thompson*, when a Master in Chancery, and from some other Masters; who stated, that there was no settled opinion upon it; but the better practice was to calculate it as payable at the end of a year. They doubted whether, if a sum of money was directed to be placed out to produce an annuity, that was to be

In all cases of legacy interest only from the end of a year from the death; unless otherwise directed: the old rule, depending upon the fund, as productive or barren, being exploded (1) Whether a sum of money directed to be placed out to produce an annuity is to be considered as legacy or annuity with reference to the time of payment, *Query*.

(a) 1 *Ves.* 308.

{ (1) See the rule stated, 5 Binn. 475. 3 Desaus. Cha. Rep. 387. *Shobe's Ex.* v. *Carr*, 3 Munf. 10.}

considered as a legacy payable at the end of a year, or as an annuity, payable from the death. 1802. GIBSON v. BOTT.

As to the leasehold premises, that could not be sold, they cannot be considered otherwise than as property, which it was for the benefit of all parties to suffer to remain *in specie;* upon that I think the plaintiffs may have interest upon the value from [98] the death; for there is a consideration for that. The best decree in this cause will be to declare, that the property to be converted has been converted in a reasonable time; that the persons entitled for life shall have the interest from that conversion; and as to the other leasehold premises, that it being for the interest of all parties, that they should not be sold, a value shall be set upon them; and the persons entitled for life shall have interest at 4 *per cent.* upon that value from the death of the testator.

PIGOTT *v.* WALLER. (1)

ROLLS. *March* 3. 8. *May* 20.

A codicil, with three witnesses, though relating only to personal estate, and expressing no intention as to republication of the will, is a republication; and therefore the will containing a general devise, lands purchased in the interval pass. (2)

Estates comprised in a Recovery, the words being sufficiently comprehensive, notwithstanding an inference against the possession of the party and his intention to include them from acts done under a misconception of his title.

ROBERT PIGOTT, being seised in fee among other real estates of two undivided third parts of the manor and advowson of *Chesterton*, in the county of *Huntingdon*, and being also seised of other real estates at *Chesterton*, by his will, dated the 4th of *December*, 1724, and duly executed to pass real estate, after directing, that his personal estate, except such part as was particularly given, should be applied towards payment of his debts, legacies, &c. and giving the residue to his eldest son, as touching and concerning his real estate gave and devised the same, as follows: all those his manors, messuages, lands, tenements, advowsons, tithes, and hereditaments, whatsoever, with their appurtenances, in the county of *Salop*, not settled on his eldest son, and also all his manors, messuages, &c. in the county of *Warwick*, and also all his lands in *Little Preston* or elsewhere in the county of *Northampton*, and all his several manors and townships of *Chesterton*, *Haddon*, and other places mentioned, in the county of *Huntingdon* and *Cambridge*, and all his messuages, lands, tenements, rents, tithes, advowsons, * and hereditaments, whatsoever, and wheresoever he had power to give and devise by that his will, he gave and devised the same to trustees and their heirs; and declared the trusts, first, in case his personal estate shall be deficient to pay his debts, legacies, &c. to raise such sums as shall be necessary to pay what shall not be paid twelve months after his decease; and that the rest, residue, and remainder, of his said real estate before given in trust, as aforesaid, shall be and remain in the trustees and their heirs for the benefit and advantage of his eldest son *Robert Pigott* for his life; and from and after his decease in trust for the first and every other son of the said *Robert Pigott* successively in tail male, remainder to the [* 99]

{(1) Cited 3 Desaus. Cha. Rep. 367.}

{(2) *Cogdell's Ex.* v. *Cogdell's Heirs*, 3 Desaus. Cha. Rep. 367. See *Porter* v. *Turner*, 3 Serg. & Rawle. 108. *Kendall's Ex.* v. *Kendall*, 5 Munf. 272.}

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testator's right heirs for ever. He gave to his two daughters *Frances* and *Honor* the sum of 5000*l.* a-piece, to be paid at their respective ages of eighteen, or marriage.

The testator made the following codicil, also duly executed to pass real estate:

"Whereas in the year 1724 I made my last will; and did "then give to my two daughters *Frances* and *Honor* 5000*l.* to "each after my decease; and whereas *Honor* is married to "*John Harvey*, Esquire, and I have given to her said husband "6000*l.* I do declare that to be her fortune, and that she is "not to have any more than 100*l.* to buy her mourning. And "whereas I left in my will 5000*l.* to my daughter *Frances*, I "do give her 1000*l.* more. I do desire this to be observed as "a codicil to my will. Dated at *Chetwind*, *January* 3d, 1733. "I do also order, that my daughter *Frances* shall have 200*l.* "paid her by my eldest son, when she is married, and 100*l.* "at my decease."

[100] By indentures of lease and release, dated the 21st and 22d of *February*, 1736, the remaining third of the manor of *Chesterton* was conveyed to the testator and his heirs. The testator after that purchase made another codicil, also duly executed to pass real estate, as follows:

"A codicil made and published by me *Robert Pigott*, of "*Chetwind*, in the county of *Salop*, Esquire, the 26th day of "*June* in the year of our Lord 1742, and to be annexed to my "last will and testament, and made part thereof to all intents "and purposes. Whereas I the said *Robert Pigott* have by my "said will, (amongst other things,) given and devised to my "daughter *Frances Pigott*, the sum of 5000*l.* and by a codicil "which was made some time since my will, and annexed "thereto, I have also given and devised to my said daughter "*Frances*, the farther sum of 1000*l.* and I have since the exe"cution of my said will and codicil provided for my said "daughter *Frances*, and given or secured to her or for her use "and benefit considerably more than the legacies devised to "her by my said will and codicil, therefore my will is, that "the legacies of 5000*l.* and 1000*l.* devised to my said daugh"ter *Frances* by my said will and codicil, shall not be raised "or paid to her; and I do by this my codicil make void all "and every devise whatsoever by my said will and codicil "given, devised, and bequeathed, unto my said daughter "*Frances*. And I do hereby order and declare, that my will "is, that only the sum of 100*l.* shall be paid to my said daugh"ter *Frances* by my executrix, instead of the sum of 5000*l.* "and 1000*l.* devised to her by my said will and codicil."

The testator died in *February*, 1746. *Robert Pigott*, the son, died upon the 9th of *May*, 1770, leaving *Robert Pigott*, his eldest son, *William Pigott*, his second son, and six other children.

[101] By indentures of lease and release, dated the 15th and 16th of *June*, 1770, *Robert Pigott*, the grandson, conveyed all those the manors or lordships, or reputed manors or lordships of *Chesterton* and *Haddon*, with the appurtenances in the

said county of *Huntingdon*, and all manner of tithes to them or either of them belonging or appertaining, and also all other lands, tenements, and hereditaments, in *Chesterton* aforesaid, or elsewhere in the county of *Huntingdon*, whereof the said *Robert Pigott* or any person or persons in trust for him had any estate of freehold or inheritance in any manner however, to make a tenant to the *Præcipe* for suffering a Recovery to the use of *Robert Pigott* in fee; which Recovery was accordingly suffered in *Trinity* Term, 10 *Geo.* III.

By indentures, dated the 1st of *January*, 1772, reciting, that the premises, comprised in the indentures of *February*, 1736, had descended to *Robert Pigott*, the son, in fee simple upon the death of his father, the testator, and that he had devised the same, *Robert Pigott*, the grandson, in order that the expenses of proving the will of his father in Chancery might be avoided, ratified and confirmed the will of his father; and released to the trustees in that will all the said premises so devised.

By indentures of lease and release, dated the 4th and 5th of *March*, 1772, the heir of the surviving trustee under the will of *Robert Pigott*, the grandfather, conveyed the legal estate to *Robert Pigott*, the grandson, his heirs and assigns.

By other indentures of lease and release, dated the 13th and 14th of *March*, 1772, reciting the indenture of release of the 1st of *January*, 1772, in consideration of 16,500*l.* the devisees in trust of *Robert Pigott*, the son, conveyed to *Robert Pigott*, the grandson, and his heirs, all the premises comprised in the indentures of *February*, 1736. [102]

By indentures, dated the 16th *March*, 1772, for securing 16,000*l.* *Robert Pigott*, the grandson, demised to trustees for his sisters *Honor Pigott* and *Ann Pigott*, two of the legatees, who had joined in the sale under the will of his father, the said manor of *Chesterton* and premises, comprising all the estates, which passed by the indentures of *February*, 1736, except the third of the advowson of *Chesterton*, for 1000 years, subject to redemption.

By indentures, dated the 4th of *September*, 1779, *Robert Pigott*, in consideration of 50,500*l.* conveyed among other estates all the premises comprised in the indentures of *February*, 1736, in trust for *William Waller*, his heirs and assigns, subject to the mortgage.

Robert Pigott, the grandson, died on the 28th of *June*, 1794, without issue.

The bill was filed by *William Pigott*, the second grandson of the testator, claiming, as equitable tenant in tail, the premises comprised in the indentures of *February*, 1736; upon the ground, that the second codicil amounted to a republication of the will, and that the recovery did not comprise, and was not intended to comprise, those premises; that the deed, creating the tenant to the *Præcipe*, did not in description comprise or extend to those premises; and, with reference to the general terms, that *Robert Pigott* was not then in possession

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[* 103] * vested in him, the eldest son and heir at law of the testator, devised them upon the trusts of his will; and immediately upon his death the trustees or the parties beneficially interested under the trusts of his will entered into possession or receipt of the rents of all the said demised premises; and continued in possession until *March*, 1772; when the premises, comprised in the indentures of *February*, 1736, were sold and conveyed to *Robert Pigott*, the grandson.

The bill charged notice to *Waller*, the purchaser, of the equitable estate tail of *Robert Pigott*, the grandson; and the answer admitted notice of all the instruments. It was taken as a fact, that the codicil was not actually annexed to the will.

Mr. Romilly, Mr. Fonblanque, and Mr. Leach, for the Plaintiff.—The questions are; First, whether the second codicil had the effect of republishing the will, so as to pass the estate purchased in the interval: Secondly, if it did, whether those estates were comprised in the recovery.

It is very clear, none of the parties conceived, that the codicil had this effect. There are many cases upon this subject: but the law is perfectly settled by the last, *Barnes* v. *Crowe*:(a) in which all the preceding cases are cited, and much discussed; and Lord Commissioner *Eyre* seems to consider it absolutely settled, that where a codicil attested by three witnesses refers to the will, it passes the whole, including lands purchased in the interval; exploding the doctrine of the necessity of actual annexation. The case of *Lady Strathmore* v. *Bowes* (b) went

[104] upon the particular circumstances; and therefore confirms the rule. That decision was affirmed in the House of Lords; Lord *Thurlow* however dissenting, and holding it a republication even under those circumstances. The direction, that the codicil shall be part of the will, is equivalent to saying, they shall be one instrument, by bringing down the will to the date of the codicil, not the converse of that. This codicil adds the words "to all intents and purposes." The doctrine is not new. It is distinctly stated in Roll's Abridgment.(a) The Statute of Frauds(b) merely prescribes solemnities, as to the form of execution; not affecting the construction. The nature of a republication is only to express, that the instrument is the will at that time, and a devise of all the estate he has. With respect to the *dictum* of Lord *Mansfield*, in *Heylin* v. *Heylin*,(c) noticed by *Lawrence J.* in *Lady Strathmore* v. *Bowes*, and upon which stress has been laid in other cases, there was indication of a purpose to pass estates in a particular place: but if it had not been confined to a particular place, but was gene-

(a) *Ante*. vol. i. 486 4 *Bro. C. C.* 2.
(b) 7 *Term Rep.* 482.
(a) p 104 1 *Rol. Ab.* 618.
(b) Stat. 29 *Ch.* 2. c. 3.
(c) *Cowp.* 130. See page 132.

tal, then it would have done. These are exceptions founded upon the principle itself. According as the disposition by the will is limited or general, the effect of the codicil will be limited or general. *Barnes* v. *Crowe* proves a proposition much larger than is necessary for this case: viz. that the codicil is a republication, so as to embrace all the property acquired at the date of that codicil. The principle is very satisfactory; that it is manifest, the devisor at that day considers his will; and desires it should speak upon that day. This codicil contains express words of annexation; upon which so much stress has been laid; though that is now matter of surprise; the declaration, that it is his codicil, being in effect the same as a declaration, that it is to be annexed to the will: a codicil being in its nature a part of the will. In the will a marked anxiety appears to dispose of all the estate he had.

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Upon the second point this inconsistency arises from the defence. The party is supposed in 1770 to have suffered a recovery, and to have become seised in fee, of an estate, for which two years afterwards he gives 16,500*l.* as a purchase. Upon these instruments, notice of which is admitted, it appears, that he had not such an estate in this part of the premises as he could convey. It is necessary, that the person creating the tenant to the *Præcipe* should be in possession of the estate, whether legal or equitable: otherwise he cannot give it. This person was not in possession. It is also necessary, that he should intend to give it. It is not sufficient, that in the deed he uses general and comprehensive words, that would embrace even lands, of which he did not know that he was seised. There must be the intention; which it is clear there was not in this instance; having no conception at the time, that he had any title to these estates. The subsequent purchase amounts to demonstration, that he did not think he had suffered a recovery, and acquired the fee of them. He adopted the construction of his father by contracting for the purchase with the persons deriving under his father. There is a well drawn result of all the cases of recovery by *Cestuy que trust* in tail by *Mr. Cruise;* showing, that he must be tenant in tail in possession: as equitable recoveries are to possess all the forms, as far as possible, of legal recoveries. However general the words, the question must be always as to the intention. If the exemplification of the recovery estopped the party without showing the intention, to what an extent would that go! It appears at first surprising, that the same form of proceeding should be necessary to destroy an equitable as a legal estate tail: the latter depending upon the recompense to be recovered over. The principle is however satisfactory. The party having the same quantity of interest, ought to have the same disposing power, for uniformity of judicial decision. If the equitable estate could be destroyed in any other way, the interest of the issue in tail would be less protected in equity than at law.

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Mr. Richards, Mr. Sutton, and Mr. Harvey, for the Defendant Waller: Mr. Piggott, for other Defendants.—The defendant *Waller* has the legal estate, purchased for valuable consideration. The bill is filed by a person claiming title in equity to take from such a purchaser the estate he has, and the advantage the law undoubtedly gives him.

Upon the question of republication, none of the preceding cases establish the decision of the Lords Commissioners in *Barnes* v. *Crowe*. An heir is not to be disinherited by inference not necessary. He has a right to see that the acts disinheriting him are unequivocal, clear, and decisive. The cases prior to *Barnes* v. *Crowe* require a clear intention to republish, and for the purpose of passing the after-purchased estate. Before the Statute of Frauds a will might be republished by *parol: Beckford* v. *Parnecot.(a)* The other Judges doubted *Fenner's* opinion, and determined upon the other ground. Instances are there put of the two sorts of republication, express and implied. All the Judges but one thought, that even annexation would not do; that the inference as to the intention could not be drawn from that circumstance alone. In *Lytton* v. *Lady Falkland(b)* the codicil, as in this instance, was di-
[107] rected to be annexed; but it was not in fact annexed; and that was considered one reason for holding it no republication. In *Penphrase* v. *Lord Lansdown (a)* a similar decision was made. In *Acherley* v. *Vernon,(b)* upon which *Barnes* v. *Crowe* was determined, the codicil was clearly incorporated by internal evidence; the codicil making alterations in the will. They were really one and the same paper. In Com. Dig.*(c)* there is a passage, that a new publication for another purpose is not sufficient; as if a testator after a new purchase annexes a codicil for legacies, this is not sufficient to pass the land without words for such purpose; and though no authority is given, the passages in that work, for which no authorities are cited, have been always considered great authority. *Hutton* v. *Simpson (d)* is disapproved by Lord *Camden* in *The Attorney-General* v. *Downing,(e)* but without reason. In *Cholmondeley* v. *Cholmondeley (f)* the codicil had not the effect of passing the lands purchased after the date of the will. In *Potter* v. *Potter (g)* Sir *J. Strange* proceeded upon the ground, that the word "republished" was used; and also, that the codicil operated by additional charge upon the real estate. The reason was, that it affected the real estate he had. In *Gibson* v. *Lord Montfort*, and *Gibson* v. *Rogers,(h)* Lord *Hardwicke* discusses the point; but there was no decision. In *Jackson* v. *Hurlock (i)* there were no after-purchased lands; but the will was com-

(a) *Cro. El.* 493. 1 *Rol Ab.* 618. (b) 2 *Eq. Ca. Ab.* 768.
(a) p. 107. 10 *Mod. Rep.* 96; stated, *ante*, vol. i. 496, in *Barnes* v. *Crowe*.
(b) *Com. Rep.* 381. 3 *Bro. P. C.* 107.
(c) See 3 *Com. Dig.* Devise. *E* 4, 5.
(d) 2 *Vern.* 722. *Simpson* v. *Hornsby*. *Pr. Ch.* 439.
(e) *Amb.* 571. (f) Cited 1 *Ves.* 489. (g) 1 *Ves.* 437.
(h) 1 *Ves.* 485. *Amb.* 93. (i) *Amb.* 487.

pletely revoked at the date of the codicil. There is a great difference between a republication for the purpose of passing after-purchased lands and for republishing a will revoked. The testator spoke of his will as subsisting; * and though it was in point of law revoked, yet it was republished by referring to it, acting upon it, and annexing a codicil to it. A codicil is to be taken as part of the will to all intents and purposes by inference of law. It is so considered by Sir *Joseph Jekyl* and Lord *Hardwicke;* and must be so considered in point of law. In *The Attorney-General* v. *Downing* the codicil *(a)* has a strong expression; charging all his lands with two annual payments; yet, there being no evidence of an intention to republish the will, it was held by Lord *Camden* no republication; an heir at law not being to be disinherited by implication not necessary. There is therefore a series of authorities, very clear in the result, that unless an intention perfectly unequivocal to republish appears, the mere circumstance of a codicil with three witnesses will not have that effect. In *Copping* v. *Fernyhough (b)* Lord *Thurlow*, being pressed with these cases, avoids determining the general point; declaring, that he purposely avoids it. It rests, therefore, upon *Acherley* v. *Vernon* and *Barnes* v. *Crowe.* The prior cases, though some suppose annexation necessary, and others do not, all suppose something necessary to bring the will down to the date of the codicil. The case of *Barnes* v. *Crowe* turns entirely upon *Acherley* v. *Vernon;* which does not support it. Upon examining the minute of the House of Lords, it appears that case went upon the incorporation. *(c)* [* 108]

The codicil in this case was not annexed, though directed to be annexed. The testator then did not do what he intended to republish his will; if he had it in his contemplation to do so. When he made the first codicil, he had no purpose to republish the will. He had not then any after-purchased lands. The direction, that the codicil shall be annexed to his will, and made part thereof, is no more than the law would say without such direction. The sole purpose was to alter legacies. He might have conceived it right to revoke the bequest of the £6000 with three witnesses: but suppose no reason can be assigned for that, is there a necessary inference to disin- [109]

(a) That codicil, dated the 23d of *December*, 1727, gave to *Mary Townsend*, for her life, 200*l.* a year, and all the furniture in her room, and also 100*l* : the one hundred pounds to be paid her within two months after the testator's decease. He also gave her daughter 500*l.* yearly during her life; and proceeded thus:

"And I do charge all my lands with the payment of these two annual payments," to *Mary Townsend* and her daughter.

(b) 2 *Bro. C. C.* 291.

(c) By the Minutes of the House of Lords, 4th of *February*, 1725, it appeared, that the Judges were of opinion upon the first question, that fee-farm rents would not pass, but profits of lands would; and upon the second, that the codicil was incorporated with the will; which making it one was a republication thereof. After debate the question was put, whether that part of the decree relating to the fee-farm and other rents be reversed. Resolved in the negative; and adjudged, that the appeal be dismissed and the decree affirmed.

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herit the heir? The land had been conveyed to him six years before; and was not in his contemplation. Either the instrument ought to be re-executed, or the codicil ought clearly to show the intention according to all the cases previous to *Acherley* v. *Vernon*, or it ought to be so executed as to carry with it from the mode of execution such intention, either by being upon the same paper, or by being annexed to the will, so as to raise the supposition, that he had that paper in his hand. It is an extraordinary proposition, that an instrument executed for the mere purpose of altering or revoking the will as to a legacy, for instance £5 to a servant, should have the effect of giving the will a greater effect by passing after-purchased lands. There is no inconsistency, as supposed by Lord Commissioner *Eyre*, between *Acherley* v. *Vernon* and *The Attorney-General* v. *Downing*; the former going upon the particular circumstances; not laying down a general rule, that a codicil with three witnesses shall republish the will for this purpose; and *Barnes* v. *Crowe* might have been well decided upon the circumstance, that it was all a continuation of one paper; it was impossible to publish one without publishing the other. The words of the codicil in *Acherley* v. *Vernon*, "I devise my real estate to them accordingly," were sufficient to carry the real estate independent of the will. The codicil in *The Attorney-General* v. *Downing*, after giving two annuities of 500*l.* and 200*l.* proceeds thus: "And I do charge all my "lands, with the payment of these two annual payments" to *Mrs. Townsend* and her daughter. This codicil, so far from being necessarily a republication of the will, is a mere act of revocation; containing no mark of bounty; intending no addition to, but to take from, the will. What Lord *Kenyon* says in *Lady Strathmore* v. *Bowes* puts an end to all the doctrine, that the mere execution of the codicil will do; stating the question to be, whether the intention was to pass by the codicil any thing more than would have passed by the will itself.

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Upon the second question, is it contended, that an actual entry by the tenant in tail is necessary to make a tenant to the *Præcipe*? In point of law, he was tenant in tail in possession for that purpose from the moment the tenant for life died. There is no evidence, that he was not in possession. He must therefore be taken to be equitable tenant in tail, the possession being in point of law with his trustee, and in equity with him, unless a disseisin can be shown. At the date of the deed for making the tenant to the *Præcipe* there was no adverse possession against him. It is impossible to show an equitable disseisin. The rents could not be received. They were not due. No one else received them. The tenant was tenant of the person entitled. The Court is therefore called upon to presume, that there was no possession. It cannot be said, the recovery is bad, and against a purchaser, because a year and a half afterwards a disseisin was permitted. *Bull* v. *Wyat*. (a)

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(a) Cro. Ch. 388.

The argument is, that by a subsequent act, the purchase a year and a half afterwards, it appears, he was not in possession; but during the preceding year and a half the possession must be presumed with him; adverse possession not being shown. No sale was then in contemplation. That transaction a year and a half afterwards cannot destroy the effect of the recovery; which bars all latent entails, &c. It is impossible to say, the description does not include these very lands. That description is correct, if they were to be included, and inaccurate, if they were not. Undoubtedly the intention was to defeat all the limitations, and convert his estate to a fee simple. The transaction of the purchase from the trustees may be accounted for. It might have been suggested, that the codicil was not a republication. Then dealing with his sisters, proposing to give them 16,000*l.* in satisfaction of whatever they might be entitled to under the will, to prevent family litigation, he might naturally say, there was a doubt; that he had suffered a recovery, in case he should be tenant in tail; but he would not put it upon that question between him and his sisters; but would purchase from the trustees; and the next day he makes a provision for his sisters. It was a family transaction. As to the notice, the notice admitted is only knowledge of the deeds, not of the fact, upon which the plaintiff relies, that there was no possession in *Robert Pigott;* unless those deeds prove that. Can the defendant be affected with notice of that fact merely by the transaction with the trustees two [112] years afterwards? That is the only fact, the knowledge of which can affect his conscience. The words of the recovery comprising the premises, a purchaser or mortgagee is not to be called upon to show an intention to include them. Words more general and comprehensive could not be used; sweeping words to take in every thing omitted. After the recovery the court would have ordered the trustees to convey to him.

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This point involves most important consequences, if it can be contended, that a tenant in tail, not in actual possession, cannot suffer a recovery. It was not the old law, that a tenant in tail in equity must suffer an equitable recovery. Till the case of *North* v. *Champernoon (a)* he could deal with it as tenant in fee; *Fletcher* v. *Tollet, (b)* and *Radford* v. *Wilson, (c)* referred to in the note. *(d)* The subject is also noticed in *Legate* v. *Sewell. (e)* It is not now however to be contended, that a recovery is not necessary, if the party is tenant in tail in equity. But such a tenant in tail, where there is no preceding estate of freehold, is entitled to suffer a recovery, whether he has actually entered, or received the rents, or is in the actual possession or not. There is a great difference between seisin and possession: *Matheson* v. *Trot. (f)* Whoever takes by devise is in immediately upon the death of the devisor; and no entry is necessary. So, a person taking in remainder, after an

(a) 2 *Ch. Ca.* 63. 78. 1 *Vern.* 13.
(b) *Ante,* vol. v. 3.
(c) 3 *Atk.* 815.
(d) *Ante,* vol v. 13.
(e) 1 *P. Will.* 91.
(f) 1 *Leon.* 209.

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estate for life, is in immediately on the death of the tenant for life, without actual entry. The possession of the tenant is that of the party entitled to the rents; who has a sufficient possession to sustain a recovery; unless there is a disseisin or intrusion. Nothing short of that can prevent the freehold in
[113] law from remaining in the party entitled to it. In *Taylor* v. *Horde*,(a) in which case Lord *Mansfield* goes at large into the doctrine of disseisin, and which was brought on again in *Cowper's* Reports,(b) and the judgment affirmed in the House of Lords, the recovery was held bad, though under actual possession recovered in ejectment: the right being in the person who had the freehold in law. From that case and passages in *Pigott* (c) it is clear, that possession without the freehold will not do, and the freehold without the possession will do. Even if the trustees had taken the rents, that would not have been a disseisin; for a disseisin is a tortious act; and a man cannot be disseised with his own consent, except in those cases, in which he is at liberty to consider himself disseised for the purpose of bringing such action as best suits his purpose. Sir *William Cordell's* case (d) is also strong to show, that though the possession is in others, the legal freehold is in the party entitled to it: who is seised notwithstanding the actual possession in others. The circumstance, that it is an equitable estate, increases the difficulty of supposing a disseisin. In equity, mistake will not operate to the prejudice of the party. As Lord *Hardwicke* says in *Lord Townshend* v. *Ash*,(e) the law allows fictions to support a right, but not to create a wrong. The rule is never to consider any interest after a vested remainder in tail. For the purpose of sale, partition, &c. the Court looks no farther than the first person entitled to an estate of inheritance. *Challoner* v. *Murhall*(f) bears much upon this. In *Philips* v. *Brydges* (g) the Court confirmed the act of equitable tenant in tail, without regard to the trustee. There can be no distinction between a recovery upon an equitable and upon a
[114] legal estate, with respect to the recompense over in value. A common recovery is in truth now looked upon as nothing more than a mode of conveyance, which the law allows to tenant in tail.(a) Is it consistent with that, that equity should now overturn that conveyance upon such grounds? Such an objection involves consequences the most extensive and dangerous to property and title.

A third consideration is, whether a person in such a situation has any right to call upon a Court of Equity for assistance? or whether there is any equity in the case? *Challoner* v. *Murhall*; (b) *Fletcher* v. *Tollet*; (c) and this assumes a very different complexion in the case of a purchaser. This Court will not assist such a plaintiff to take from a purchaser an estate

(a) 1 *Bur.* 60. (b) *Doe* v. *Horde*, *Cowp.* 689.
(c) *Pig. Rec.* 41. (d) Cited 8 *Rep.* 96, in *Matthew Manning's* Case.
(e) 3 *Atk.* 336. (f) *Ante*, vol. ii. 524. (g) *Ante*, vol. iii. 120.
(a) p. 114. *Willes's Rep.* 453. 1 *Wils.* 73. *Martin* v. *Strachan*.
(b) *Ante*, vol. ii. 524. (c) *Ante*, vol. v. 3.

sold in the face of the remainder-man in equity; who permitted the money to be paid; and who, if he had intimated a doubt about the title, would have been barred immediately by a recovery.

Mr. Romilly, in Reply.—As to the third question, was it incumbent upon the remainder-man to tell his brother, he might cut off the intail? It is too much to say, a Court of Equity does not regard an interest standing after an estate tail. The *Lord Chancellor's* Act, (*d*) and the construction that has been made upon it, (*e*) show the contrary: but at all events the prior estate tail must be in existence.

The only serious questions are the other two. As to the republication, all the authorities, except *Lytton* v. *Lady Falkland*, and *Hutton* v. *Simpson*, which two cases have been overruled, [115] make out this proposition; that, where a codicil, attested by three witnesses, is expressed in terms, from which it appears, that by executing the codicil, the intention was to republish the will, it shall pass after-purchased estates, though the testator had them not in contemplation; and it is not necessary to show an intention in that codicil to pass them. The object of that codicil may be only to revoke a legacy. The words "to all intents and purposes," therefore, are not immaterial. The case of *Penphrase* v. *Lord Lansdown* is also overruled by *Acherley* v. *Vernon*. The questions put to the Judges show the true ground of that case; and that it was not that, which is now supposed. It was taken in all the subsequent cases as the clear ground, that the codicil was a republication, and as such passed the after-purchased estates. Besides some after-purchased estates were expressly devised by that codicil; whence a fair argument arose, that he did not mean to pass the rest of that after-acquired property. *Hutton* v. *Simpson* is explicitly treated as of no authority, particularly in *The Attorney-General* v. *Downing*. The passage in *Comyns's Digest* is a mere opinion against decisions; but even that passage does not support that, for which it is cited; for it supposes the qualification, that there are no words to show, he means a republication of his will. In *Gibson* v. *Lord Montfort*, though not a decision upon the question, Lord *Hardwicke* gives a clear opinion in favour of the republication; and *Potter* v. *Potter* is, as far as it goes, to the same effect. According to *Jackson* v. *Hurlock*, the only consequence of republishing the will is to make it speak at that time. What difference in good sense can there be between the annexation of a codicil and a separate paper; unless indeed the annexation takes place before execution? and then there ought to be a declaration by the testator, to show, that it was previous. If there is any thing in subsequent annexation, it depends merely upon the [116] intention; and then the expression of desire, that it shall be annexed, is precisely the same. *Doe* v. *Davy* (*a*) is not near

(*d*) Stat. 40 *Geo.* 3. *c.* 56. (*e*) *Ex parte Bennet*, *ante*, vol. vi. 116.
(*a*) *Cowp.* 158.

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so strong in favour of a republication; for by that codicil, the devisor makes a disposition of real estate. It appears therefore, that he had that real estate in contemplation. In this case there can be no purpose but to republish the will. What other meaning can the words "to all intents and purposes" have? His intention must be conceived thus: "I mean as "completely not to die intestate as to any part of my pro-"perty, as I meant at the date of my will; in which I used "the most comprehensive words; and I mean the same thing "now; except in the respect, in which I now alter it."

As to the recovery, the argument is, that, before a person can suffer a recovery, he must have some kind of possession; not that he must have made an actual entry; and in this instance it appears by clear and satisfactory evidence, that at the time of the recovery he was not in possession. It is said, he had a right to the possession; and that is a seisin in law. But he did not know he had a right to the possession: nor is that admitted. He supposed, as his father supposed, that he had no such right. He takes a conveyance from the trustees of his father's will. The deed reciting the will, and that the estate passed by it, that is an admission, that the estate was properly devised, and that the devisees had taken possession under the will. In the absence of all other evidence, that is strong evidence, that he was not in possession. How do the authorities referred to bear upon the question? As to the passage in *Pigott*, (b) there can be no doubt, that where the tenant for life surrenders to the remainder-man in tail, the possession of the former is that of the latter. As to *Taylor* v. *Horde*, it is agreed, a person not [117] having an estate of freehold cannot suffer a recovery, though in possession: but I deny, that the converse of that proposition follows. It is not likely, according to human nature, that he should mean to do an act of kindness, without a suggestion, that he thought he had the absolute title; and taking all the discredit of making a dry purchase. Such an inference is impossible. The words of the deed making the tenant to the *Præcipe* are general, taken from the will: but there was no intention of passing this estate by the recovery: nor was the party in possession.

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The Master of the Rolls.—The first question, whether the land, of which the plaintiff claims to be equitable remainder-man in tail, passed under the will of *Robert Pigott*, the grandfather, depends upon another question; whether that will was republished by the codicil of 1742? It is admitted, the estate did not pass by the will, as originally executed. That will has never been re-executed. The codicil executed since does not profess to pass this estate. If this question were entire, it would be difficult to maintain, that the estate was well devised, consistently with the rule, that the will operates upon such lands only as the devisor had at the time of the exe-

(b) *Pig. Rec.* 41.

cution, and consistently with the Statute of Frauds; by which no land can be devised but by a will duly executed according to the provisions of that Statute. The conclusion in former times upon this subject was, that the land remained undevised. No doctrine was more settled than this was at one period. In *Lytton* v. *Lady Falkland*, in 1708, upon a codicil not much differing in substance from this, Lord *Cowper*, assisted by the Master of the Rolls, and two of the Judges, held, that, since the Statute of Frauds, there can be no devise of lands by an implied republication; for the paper, in which the devise is [118] contained, ought to be re-executed in the presence of three witnesses. A similar question arose three years afterwards, in the 11th year of Queen *Anne*, in *Lord Lansdown's Case;* which contained a strong circumstance of constructive republication; the codicil containing several references to the will: but it was held by Lord *Parker*, and the whole Court of King's Bench, that since the Statute there can be no republication by implication; but the will must be re-executed. In *Hutton* v. *Simpson*, or *Simpson* v. *Hornsby*, as it is called in *Precedents in Chancery*, the same doctrine is recognised. Then came *Acherley* v. *Vernon*, in which the doctrine of constructive republication was introduced for the first time, as far as I can find, since the Statute. A direct republication, or re-execution, is an unequivocal act, making the will operate precisely as if it was executed upon the day of the republication. But a reference to the will proves only, that the devisor recognises the existence of the will; which the act of making a codicil necessarily implies: not, that he means to give it any new operation, or to do more by speaking of it than he had already done by executing it. Why his speaking of it should make the will speak, as it is said, is not very easily discernible, as a question of intention. It has not ceased to exist. Therefore, if he speaks of it at all, he must speak of it as existing upon the last day as well as the first. But can that show, that he means it to exist in any other form, or with any other effect, than he originally gave it?

In *Acherley* v. *Vernon*, the House of Lords did not determine, nor in subsequent cases were they understood to have determined, that every codicil duly executed would republish a will. Then it is a question of intention, upon the particular wording of the codicil. Each case must depend upon its own peculiarities. I much question, whether by substituting un- [119] certainty for certainty the intention would be accomplished. It can hardly be stated, as a general rule, that by a codicil relating only to a trifling legacy, the devisor should be supposed to give his will any farther effect as to his real estate. Even when he says, he ratifies and confirms his will, that means only, as it already stands, and the disposition already made. If it is said, there is any form of words, upon which in all cases a definite construction shall be put, you do not profess to inquire into the actual intention in the given case: but you set up a technical rule, that will as often frustrate, as execute,

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the intention. If we are to have a rule, the old rule appears to be the better; for that is consistent with the Statute. That decision does set aside the old rule; and to the authority of that decision the Court have found themselves bound, as I am, to submit.

From the decision of that case to that of *Barnes* v. *Crowe*, Courts of Equity have been much at a loss what precise line to adopt; holding the codicil sometimes a republication, sometimes not to have produced that effect. In *Cholmondeley* v. *Cholmondeley*, (a) decided in 1733, it was held, that the codicil, though distinctly referring to the will, did not republish it. In *Potter* v. *Potter* (b) on the other hand Sir *John Strange* held the codicil a republication; and could not have held otherwise consistently with *Acherley* v. *Vernon*. In *Jackson* v. *Hurlock* the codicil was held under the circumstances a republication. In *The Attorney-General* v. *Downing* Lord *Camden* held the codicil not a republication; and he takes it to be a question of intention; and that there was no republication, because no intention to republish appeared in the codicil. It
[120] does not appear that Lord *Hardwicke* ever made a decision upon this point; but in *Gibson* v. *Lord Montfort* he discusses it. He seems evidently to have felt a degree of embarrassment from the situation in which this question was left, and to have entertained a wish to extract from *Acherley* v. *Vernon* itself some distinct and precise rule; and though he did not decide, he strongly inclined to hold, that upon the principle of that case every codicil duly attested ought to be held a republication. The Lords Commissioners in *Barnes* v. *Crowe* appear to have determined that to be the rule established by that decision; and they adopted and acted upon that rule in that case. Their opinion seems to be, that the codicil was incorporated with the will. The general proposition, (a) referred to by Lord Commissioner *Eyre*, is, that the execution of a codicil should in all cases be an implied republication. Lord Commissioner *Eyre* states the particular circumstances in that case, amounting to what he calls internal evidence of annexation: the first codicil, which was not duly executed, was begun upon the last sheet of the will; and the codicil duly attested was begun upon the last sheet of that codicil. But Lord Commissioner *Eyre* inclined to think annexation could have no effect; and he abandons that ground for fear of intrenching upon the Statute, by raising evidence out of circumstances in their nature parol; and takes the general ground as safer and better. Undoubtedly therefore that case was determined upon that general ground. It would be impossible without contradicting that case, which, as it lays down a general rule, I have no disposition to do, to determine in this case against the republication. Except that single circumstance, which Lord Commissioner *Eyre* afterwards expressly lays out of the question, the annexation, there

(a) Cited 1 *Ves.* 489. (b) 1 *Ves.* 437.
(a) p. 120. *Ante*, vol. i. 498.

is no substantial difference between that case and this. * That affords a certain rule; and if I depart from that, it would only be to set every thing loose again; not to get back to, what I think better, the old rule; for then *Acherley* v. *Vernon* would be in the way. I am therefore disposed, from the convenience of adhering to settled rules, and deference to former decisions, to hold this codicil a republication. 1802. PIGOTT v. WALLER. [* 121]

It follows, that, whatever might be the misapprehension of the parties as to their rights, it must be taken, that the estate in question passed to the trustees under the will of the grandfather; that his son had only an equitable life interest in them; and his will could not in any degree affect them. When he had a son born, an equitable estate tail vested in him in remainder; and, when his father died an estate in possession. Then he had such an estate as could be the subject of equitable recovery; that is, clearly an equitable estate tail. He did suffer a common recovery in words broad and general enough to comprehend the lands in controversy; which are included by name, as well as by general description; and if the moment after he had sold them, it does not seem, that the plaintiff could in any way impeach the title of the purchaser; for he would not, as far as now appears, have been in possession of any fact, out of which an objection could arise. But from a fact that occurred afterwards, an inference is drawn, 1st, that at the time of the recovery the party, who suffered it, must have been out of possession; 2dly, that he could not intend to comprehend these lands; and therefore the recovery neither could, nor was meant, to affect the estate claimed by the plaintiff. The acts relied on for that purpose are these: *Robert Pigott*, the father, having devised that land to trustees, the son released to those trustees, in order to relieve them from the necessity of proving the will in Chancery; and he afterwards purchased that very estate from the trustees. [122]
These acts are said to show, that he was ignorant of his rights under the will; and could not intend to suffer a recovery of lands, to which he did not think he had any claim. On the contrary, it is said, the trustees would take possession of all the estates devised to them. It is highly probable, I admit, that he was ignorant of his right. He supposed, the estate descended. He did not know, the codicil was a republication of the will. But in contemplation of law, the right was in him as completely and absolutely, as if he was perfectly apprised of it. The legal consequence would be produced without regard to his ignorance or knowledge. The trustees would be seised in trust for him; not for those whom he might erroneously suppose entitled. The possession of the tenant would in the eye of the law be his possession, or that of his trustees; not of a stranger, who by mistake might be supposed to have the right. That belief would not acquire the possession to a stranger. He could acquire it only by the means to be used necessarily by the lawful owner, conusant of his right. What is proved to have been done between the time of the

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death and the recovery, that would clothe them with an adverse possession against the true owner? The possession and the right are presumed to go together, till the contrary is shown. I cannot hold the rightful owner out of possession, unless you show me some other person, having adversely obtained possession at that period. There is nothing even making that probable. The interval from the death was too short to admit an inference of the receipt of rent by the trustees; supposing, that receipt would make an adverse possession. The utmost extent is, that there is some doubt about the possession at that period; but it would be a complete inversion, because there is some doubt, to hold the possession to be out of him, in whom the right was, and in those, in whom it was
[123] not. What afterwards happened is quite immaterial; for the question is, whether at the moment of executing the deed to make the tenant to the *Præcipe*, he was disabled from making an estate of freehold; if not there was no incapacity to suffer a recovery.

Then with regard to the intention to include these lands, a recovery would be very precarious evidence, if any thing more was necessary to its validity, than the right to suffer it, and the fact of comprehending the estate. That fact is not disputed. It would be extremely dangerous to suffer it to be impeached by extrinsic evidence of the intention. But the evidence shows nothing contrary to the intention, that these lands should be included. It shows only, that he had no distinct and definite knowledge, that they were included; not knowing, that he could by including them make himself absolute owner. But he had the general intention to include all lands, of which he was tenant in tail: for the words express all the lands in *Chesterton*, or elsewhere, whereof *Robert Pigott*, or any person in trust for him, had any estate of freehold or inheritance in any manner however. His intention was to include all he might include, and he had the precaution to use words to effectuate that intention; and therefore to say, that notwithstanding that intention and that precaution nothing more than what he actually knew he was entitled to was comprised, would be to counteract the intention. He meant to convey according to his right; and I am desired to hold, that he meant to convey only according to his opinion.

My opinion therefore is, that the recovery barred the estate tail. I must therefore hold, that the plaintiff has no right;
[124] and must dismiss his bill; and, under the circumstances, I do not know how I can do otherwise than dismiss it with costs.

A few days afterwards, *The Master of the Rolls* said, he had forgot to observe, that he did not conceive the decision in *Lady Strathmore* v. *Bowes* to be inconsistent with that of *Barnes* v. *Crowe*. It does not follow from the doctrine in the latter case, that, if it distinctly appears upon the face of the codicil, that it was not the intention to republish the will, the

codicil should be held a republication. In *Lady Strathmore* v. *Bowes* the Court held, that it appeared upon the face of the codicil, that it was not the intention to pass any other lands than those which were devised by the will. It would have been a contradiction therefore to make it pass after-purchased lands.

The plaintiff appealed from this decree: but the appeal was not heard; the decree being affirmed under a compromise as to the costs.

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Feb. 8. 11. *May* 20.

Bequest to executors, in trust, that they shall pay, &c. unto and amongst the testator's two brothers and his sister, or their children, in such shares, &c. and at such times, &c. as the trustees, or the major part, or the survivor, his executors, &c. shall think proper. All the children living at the death of the testator held entitled with the parents, *per capita*: the Court not having a discretion. Executors charged with interest upon balances in their hands. (1)

THOMAS LONGMORE, by his will, dated the 21st of *December*, 1787, after directing that his debts and funeral expenses should in the first place be discharged, subject thereto, gave and bequeathed all his personal estate of what nature or kind soever and wheresoever to his executors; upon trust, that they shall pay, apply, and dispose of, his said personal estate unto * and amongst his two brothers *Joseph* and *Benjamin Longmore*, and his sister *Hannah Longmore*, or their children, in such shares and proportion and at such time or times as they, his trustees, or the major part, or the survivor of them, his executors or administrators, shall in their discretion think proper.

The testator died in *December*, 1790. The executors not having made any disposition of the whole, but having made some payments to the testator's brothers and sister, the bill was filed by *Benjamin Longmore*, to have the accounts taken, and the residue divided, as the Court should direct.

By a decree, made on the 26th of *February*, 1798, the accounts were directed; and by another decree, made on the 11th of *February*, 1802, an inquiry was directed as to the balances in the hands of the executors from year to year, and what children the plaintiff and the defendants *Joseph Longmore* and *Hannah Forster*, formerly *Longmore*, had at the death of the testator; and if any were dead, who were their personal representatives.

The Master by his report stated balances in the hands of the executors from the year 1791 to the end of 1797, increasing every year, and finally amounting to 458*l.* 2*s.* 1*d.* That sum was paid into the bank by order.

The report stated upon the other subject of inquiry, that the plaintiff had the following children living at the death of the testator, the defendants *Elizabeth Longmore*, born in 1775, *Thomas Longmore*, born in 1779, and *Samuel Longmore*, born in 1782; all living at the date of the report. *Mary Longmore*, born in 1784, who died in 1798; *Martha Longmore*, born in [126]

{(1) See the note to *Piety* v. *Stace*, *ante*, vol. iv. p. 620.}

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1787, who died in 1792; and *Benjamin Longmore*, born in 1789, who died in 1792.

Joseph Longmore had two children, the defendant *Elizabeth Ridgeway*, and the defendant *Benjamin Longmore;* the latter of whom went abroad about nine years ago; and had not since been heard of. *Hannah Forster* had no child living at the death of the testator.

Mr. Lloyd, and Mr. W. Agar, for the Plaintiff.—The executors not having made a disposition, the Court will give the fund equally among the objects; and the children are not to take with their parents. *Royle* v. *Hamilton,* (a) and *Davenport* v. *Hanbury,* (b) come nearest to this case. The natural construction is, that the children can take only in the event of the parents being dead. There is no discretion in the executors.

Mr. Cooper, for a daughter of the Plaintiff by a former marriage. Mr. Benyon, for other children of the Plaintiff; and Mr. Fonblanque, for other Defendants.—The parents are not entitled exclusively: but the children take equally with them. The word "*or*" has been construed "*and*" in a variety of cases, (c) where the intention required it. In *Royle* v. *Hamilton* there was no power over the property; and the question was, not upon a bequest to children, but whether grandchildren could take under the word "issue." The argument for the plaintiff adds to this will the condition, "if the parent is dead;" which is taking a great liberty with it. The answer may be given, "*sic voluit sed non dixit.*" In the cases cited there was great ambiguity and uncertainty in the words. In
[127] this instance it is not necessary to convert the word "*or,*" to "*and;*" for this is not in immediate bequest to them or their children, but a bequest by implication in default of appointment, if those words cannot be added. The power of the executors is unlimited in time. They had their whole lives for the execution of it. If the word "*or*" is to be construed "*and,*" they might have made an unequal distribution, if fairly, and if in the exercise of a sound discretion there was reason for discrimination; though certainly they could not make an illusory appointment. (a)

Mr. Richards for the Executors.—The executors still claim the right to apply this fund according to the will; submitting to the Court the question, whether they can apply it to the children. These executors have a sort of parental discretion to apply this fund among the objects, as they shall think fit; which raises the distinction. It is their duty to make such an application, as it is to be supposed the testator, if living, would make; who probably had in contemplation a personal benefit to his grandchildren also. Some payments, unequal, have been made to the fathers of these children, and to the sister; and the executors had a right to do so before a suit instituted.

(a) *Ante,* vol. iv. 437. (b) *Ante,* vol. iii. 257.
(c) *Maberly* v. *Strode. ante,* vol. iii. 450, and the references, 452.
(a) p. 127. *Kemp* v. *Kemp, ante,* vol. v. 849, and the references.

Under this direction to pay and apply an appointment is not necessary. 1802.

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Mr. Lloyd, in Reply.—The true construction of this will is to exclude the children. The executors could not have their whole lives for the execution of this power; for upon that supposition it might have been delayed, till the objects were dead. They could not give to after-born children. If they had died without having made an appointment, the fund would have vested in the two brothers and sister. It could [128] not be divided among them and the children: for then the division must have been made *per capita;* but certainly the intention was, that each brother and sister should be the head of the family, and have the portion as such. The word "*and*" has been substituted for "*or*" in aid of the intention: but in this instance it is sought for the purpose of defeating it. The word "*or*" is inserted in this will technically. *Royle* v. *Hamilton*, and the other case, shows the effect of a bequest to a person and his issue. It was urged there, as it is here, that they were pointed out in the room of the parent. It is not in the natural course, that the executors could have given to the children in exclusion of the parents.

The Master of the Rolls, when the cause was first heard, expressed the following opinion:

The inclination of my opinion is, that the children have an interest. This is not a direct bequest to the objects; but a bequest to the executors, with an authority to dispose among them. The cases are very different. In the former the Court must of necessity construe those words; for they bear no sense of themselves. You cannot execute that intention. You must either alter the word "*or*" to "*and*," and say, the children are to take either with or after their parents, or, letting the word "*or*" stand, suppose a contingency in contemplation; to the parent, if the parent is living; to the children, if the parent is not living. But in either case you must make some addition to the bequest: otherwise it would be void for uncertainty. A bequest to *A.* or *B.* is void: but a bequest to *A.* or *B.* at the discretion of *C.* is good, for he may divide it between them. That is the case of this will. I am not called upon to make any alteration in or addition to this will; which the Court * never does without necessity. A discretion is given to the executors. Could I have said, they were precluded from giving any thing to the children? I think not; and it would be a great deal to say that. The executors then having that discretion might say, to whom the fund should be given, the parents, or the children. But the Court has not that discretion; but has only to say, what class is to take; and then the distribution must be equal. In *Brown* v. *Higgs*, (a) which is now before the Lord Chancellor upon the main point, the Court was of opinion, that if the disposition belonged to the Court, they must distribute equally among the children of the

Bequest to *A.* or *B.* void for uncertainty: if at the discretion of *C.* good.

The Court never alters or adds to a will without necessity.

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(a) *Ante*, vol. iv. 708. Vol. v. 495.

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two persons. The trustee had a discretion; and might have excluded some: but this Court, having once ascertained that those were the objects of bounty, were obliged to divide it among all. So in this instance the Court must give the fund equally between the parents and the children: but the executors themselves were not so restrained. The fund vests at the time of the death; and after-born children would not take. Inquiries therefore are necessary, what children were living at the death of the testator.

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Inquiries were accordingly directed; and the cause coming on for farther directions upon the Master's Report, the Master of the Rolls made the decree according to the opinion expressed at the former hearing; giving the fund to the parents, and all the children living at the death of the testator, and the representatives of such as had since died, *per capita;* and charging the executors with interest upon the balances in their hands since 1793; no considerable balance appearing to have been in their hands before that period. (1)

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Decree for specific performance of an agreement to grant a lease, of which only one part, signed by the plaintiff, was found, in the possession of the defendant, upon the circumstances; possession, drafts prepared and approved, and the execution deferred only till repairs completed. An extension of the term according to a variation of the agreement, also in writing, was refused on the ground of want of consideration. (2)

THE bill stated, that in 1782, *Joseph Collins*, being tenant for a long term of years of a house in *Holborn*, entered into an agreement with *John Maire* to grant him a lease of the premises for thirty-one years from the 24th of *June*, 1782, at the yearly rent of 40*l.;* which agreement was reduced into writing, and signed by *Collins* and *Maire;* and afterwards it was farther agreed between them, that the term should be extended to thirty-four years, six months, and sixty-nine days, from the 24th of *June*, 1785, at the same rent; which latter agreement was also reduced into writing, and signed by them. The bill then stated, that in pursuance of the latter agreement a lease and counterpart were prepared by the attorney of *Collins*, and under his direction; but they were never executed; the execution having been deferred from time to time. *Maire*, who was the tenant previously to the date of the agreement, continued in possession under the agreement until his death, and afterwards *Edward Maire*, his representative, and after his death the plaintiff, the representative of both of them, continued in possession; and paid the rent of 40*l. Joseph Collins* died in 1790, and *Maire* in 1795. In 1798, *Ann Collins*, the widow and administratrix with the will annexed of *Joseph Collins*, gave the plaintiff notice to quit; upon which the bill was filed: praying a specific performance of the agreement, and an injunction.

The bill charged, that *Maire* in confidence of the agreement laid out 400*l.* in repairs and improvements; which he would

{(1) See 1 Johns. Cha. Rep. 512.}
{(2) See the note to *Pym* v. *Blackburn*, *ante*, vol. iii. p. 38.}

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not have done as mere tenant at will; and thereby greatly improved the value.

[* 131] *The answer admitted, and set forth, the first agreement, to the effect stated in the bill; the tenant to put and keep the premises in repair; and stated, that the part in the defendant's custody is signed by *Maire* only. The defendant does not admit, that any other agreement was entered into. The lease was prepared by an attorney, who had done business for *Collins*, but not by his directions, but by the directions of *Maire;* and *Maire* being unable to put the premises in repair, and the lease being for thirty-four years, six months, and sixty-nine days, *Collins* refused to execute; and he informed the defendant, that it was agreed between him and *Maire*, that the lease should be put an end to; and that *Maire* should continue in possession during his life at the same rent and upon the same terms as he held the same at the time of making the said agreement; for *Collins*, upon his death-bed and the day before he died, requested defendant to let *Maire* have the said premises during his life, upon the same terms he had held the same, after the said agreement was given up by him, he doing the repairs: *Collins* observing to defendant, that *Maire* was an old man, and could not live long; and some time after the death of *Collins*, defendant found the part of the said agreement signed by *Maire*, amongst some waste paper; and believes, that no part of the said agreement signed by *Collins* was found in the possession of *Maire* at his death. No application was made by *Maire* to *Collins*, after he refused to execute the lease, or to defendant after the death of *Collins*, for a specific performance of the agreement, or to execute the said lease or any other lease of the premises; although *Collins* lived four years after he refused to execute the said lease; and *Maire* lived four years and upwards after *Collins*. The defendant believes, the agreement is not a *bonâ fide*, fair agreement; on the contrary, *Collins* being much addicted to liquor, she has great reason to believe, that *Maire* availed himself of [132] the opportunity of taking advantage of *Collins*'s situation, when he was so in liquor; as such premises were at the time of entering into the agreement of the annual value of 70*l.;* and the agreement was not for the usual lease of twenty-one years, at a rack rent. She denies, that *Maire* did in confidence lay out 400*l.;* but believes, *Maire* did from time to time lay out several sums upon the premises; but denies, that the premises were put in substantial repair, according to the terms of the agreement.

A witness for the plaintiff deposed, that the defendant in a conversation with her said, she had offered *Edward Maire* 50*l.* if he would relinquish and give up possession of the premises, and all right and interest in the same, as personal representative of *John Maire.*

Another witness stated, that he was nephew and clerk to *Collins's* solicitor, and prepared the draft according to the agreement; and afterwards altered it, (according to the bill,)

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by the direction of his uncle. The engrossments were sent to *Collins*, who approved them; but said he would not execute, till *Maire* had completed some repairs he had undertaken to do; and afterwards informed the deponent's uncle, that *Maire* had completed the repairs; and he was fully satisfied therewith; and would the next time he came to town bring the engrossments for execution: but he died soon afterwards.

Mr. Alexander, and Mr. Heald, for the Plaintiff, gave up the right under the second agreement alleged.

Mr. Mansfield, and Mr. Stanley, for the Defendant.

[133] The Court will not decree a specific performance of an agreement with a variation: *Jordan* v. *Sawkins.(a)* The second contract alleged is neither proved nor admitted to have been executed: the answer stating, that there was not any other agreement. But the acts of the parties show, the agreement was waived. No application was made after the first refusal to execute.

Specific performance of a written agreement with a variation by writing; not with a variation by parol.

Lord CHANCELLOR.—The case of *Jordan* v. *Sawkins* has no reference to such a case as this; whatever the actual truth of it may be. It has never been held, that this Court cannot specifically perform an agreement with a variation. If legally agreed for, it is part of the agreement: if not legally agreed for, it is no variation. All the Court meant to say was, that an addition to a written agreement by parol would not vary the written agreement. But the defendant insisting upon that admits, that the written agreement has force; and only insists, that you shall not add that, which is parol, to that, which is in writing. It is clear, Lord *Thurlow* in that case meant only to say, that you shall not come for the performance of a written agreement with a variation, which you say was made by parol; because therefore it was not effectually made; and therefore you must either take the written agreement, or have the bill dismissed. But that is not this case; for it does not rest merely in parol. It appears, that drafts were prepared, were altered according to the agreement, sent to the lessor engrossed, approved by him; and the execution was deferred only with reference to the repairs. But it does not appear, that those repairs were to be done as an extension of the agreement. Therefore notwithstanding those circumstances, as there was no consideration for the extension of the agreement, the plaintiff is not entitled to the longer term. Then as [134] to the answer, admitting the agreement of the 10th of *January*, 1782, which is set forth, upon the terms it is probable, there was a counterpart of this instrument. It is an agreement upon the part of each; and not only the contents, but the execution shows that; the expression being "*interchangeably*." That it is not found among the papers is only a circumstance of evidence; and if it had been delivered up, the other part would not have been found, where it is. It is not improbable that

(a) *Ante*, vol. i. 404. 3 *Bro. C. C.* 388.

they might let it rest upon this short agreement without a lease, and in this Court the possession must be referred to this instrument. The other party is bound to make out that the possession was changed by some subsequent fact. The evidence shows a change in the terms of the possession was meditated; but how am I to infer, while the tenant's obligation to pay the rent still remains in their hands, that, because they would not grant the original term, they are not bound in equity? The hypothesis, that *Maire* should have the possession for his life, does not hold: the first and second administrator, who did not follow his trade of a druggist, continuing in possession. I do not consider, whether an action can be maintained, but am of opinion, that the mere non-execution of the lease is not of itself a circumstance affording a presumption, that the agreement was waived. As long as it exists the equitable title exists, and the enjoyment must be under it accordingly.

1802. ROBSON v. COLLINS.

The Plaintiff is therefore entitled to a lease for the remainder of the term of thirty-one years; and the Master must be directed to settle a lease.

Ex parte ELLIS.

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May 22.

Adjudication of Bankruptcy on *Saturday* too late for the Gazette. On *Monday* another solicitor having notice obtained a supersedeas under the general order, 26th *June*, 1793; both the bankruptcy and the supersedeas appeared in the Gazette on *Tuesday*. The supersedeas was quashed; and a procedendo issued.

A COMMISSION of bankrupt issued on the 1st of *May*, against *Benedict Paul Wagner*. On *Saturday*, the 15th of *May*, the commission was opened; and *Wagner* was declared a bankrupt; but the commission was opened too late to admit of advertisement in the Gazette of that evening. On *Monday*, another solicitor applied for a writ of supersedeas under Lord *Rosslyn's* order; (a) and on *Tuesday*, the bankruptcy, and also notice that the commission had been superseded, appeared in the Gazette.

The petition prayed, that the writ of supersedeas may be ordered to be quashed; and that a writ of procedendo may issue. The affidavit of the solicitor, who took out the commission, stated, that several of the creditors having expressed a wish, that the bankrupt's affairs might be settled by an assignment the deponent endeavoured to accomplish it: but on the day on which the commission was opened he was informed by the agent for a considerable creditor abroad, that he could not accept an assignment; upon which the deponent proceeded to open the commission. He immediately sent the adjudication to the solicitor, who afterwards applied for the supersedeas; and he has since informed the deponent, that after he knew the commission had been opened, and *Wagner* declared a bankrupt, he applied to *George Paton*, and told him, that, as the bankrupt had not appeared in the Gazette, *Paton* might apply for another commission; that he accordingly did so; and

(a) 26th *June*, 1793. 2 *Cooke's* Bank. Law, 372.

1802. on *Monday* the solicitor made the usual affidavit of his having searched the Gazettes; * and that he did not find, that *Wagner* had been declared a bankrupt.

Ex parte ELLIS.

Mr. Cooke, and Mr. Pemberton, in support of the Petition,

[* 136] relied on the circumstances stated in the affidavit.

Mr. Hart, contra, insisted on the general order; and that it was not satisfied by the adjudication, till published in the Gazette.

Lord CHANCELLOR.—I consider this as a mere matter of practice. I do not like the practice of lying by, to see, whether a general assignment can be obtained. It may be very improper in many instances. But there is a positive order giving fourteen days to proceed on the commission. In this instance the commissioners in fact adjudged this man a bankrupt. The creditor has a right to go on, unless some order of the Court stands in his way; and the question is, whether there is any order standing in his way. If there were doubts as to the petitioning creditors debt, or an apprehension, that this was a friendly commission, or, of a hurried choice of assignees, those might be proper considerations. But it is not a correct use of those considerations to take out another commission, as if the former had not been proceeded on, if it appears, that it had been proceeded on. The party might quarrel with the commission; and petition against it: but upon none of those grounds can a solicitor take out another commission, alleging, that the former was not proceeded on; if it was proceeded on within Lord *Rosslyn's* order. I cannot go the length of saying, the order is not satisfied till publication in the Gazette. Suppose the adjudication was on *Wednesday;* it cannot be published till *Saturday*. When this solicitor applied at the office on *Monday*, if he had stated, that he had been

[137] informed, the party was declared a bankrupt on *Saturday*, though too late for the Gazette, till that fact was known, he would not have had a commission.

The second commission therefore cannot stand; and the writ of supersedeas must be quashed; and the writ of procedendo must issue. *(a)*

(a) Ex parte Leicester, ante, vol. vi. 429. *Ex parte Layton, Ex parte Hardwicke, ante,* vol. vi. 434.

1802.

May 22.

HOWE *v.* EARL OF DARTMOUTH. (1)
HOWE *v.* COUNTESS OF AYLESBURY.

General rule, that where personal property is bequeathed for life with remainders over, and not specifically, it is to be converted into the 3 *per cents.* subject in the case of a real security to an inquiry, whether it will be for the benefit of all parties; and the tenant for life is entitled only upon that principle.

Bequest of personal estate not held specific merely from being combined with a devise of land.

WILLIAM, Earl of *Strafford*, by his will, dated the 25th of *October*, 1774, gave to his wife *Anne*, Countess of *Strafford*, all his personal estate whatsoever, (except the furniture of *Wentworth Castle*,) for her life, subject to the following out-payments and legacies. He also left to her all his houses, gardens, parks, and woods, and all his landed estates for her life; and afterwards all his personal and landed estates to his eldest sister Lady *Anne Conolly*, for her life; and then to the eldest son of *George Byng*, Esquire; and afterwards to his second, third, or any later sons he may have by the testator's niece *Mrs. Byng*; and then to the eldest son and other sons successively of the Earl of *Buckingham* by his niece *Caroline*: but all of them to be subject to the following out-payments and legacies. He left his wife the sum of 15,000*l.* to dispose of for ever as she pleases, and the value of 500*l.* in furniture in *Wentworth Castle*, of whatever sort she chooses; else the whole furniture to be her's, if she meets with any difficulty in * this disposition. He gave several legacies and annuities; and declared, he would have all his debts paid; and gave all his servants a year's wages.

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The testator died on the 10th of *March*, 1791. *Anne*, Countess of *Strafford*, died in his life, on the 9th of *February*, 1785. Lady *Anne Conolly* filed a bill for an account of the personal estate, &c. By a decree, made at the Rolls on the 17th of *May*, 1793, the usual accounts were directed; and it was declared, that the plaintiff would be entitled to the interest of the clear residue of the testator's personal estate during her life; and an inquiry was directed, who were the next of kin of the testator at the time of his death.

The Master's Report, dated the 7th of *March*, 1796, stated the account of the personal estate; part of which consisted of the following stocks and annuities, standing in the testator's name at his death:

4320*l.* Bank Stock.
9572*l.* per Annum Long Annuities.
750*l.* per Annum Short Annuities.

Under orders made in the cause the sums of 15,000*l.* and 4000*l.* had been paid in by the executors; and laid out in 3 *per cent.* Consolidated Bank Annuities.

By a decretal order, made on the 7th of *May*, 1796, the balance of the personal estate in the hands of the executors, and of the interest, &c. was ordered to be paid into the bank; and that the executors should transfer the 4320*l.* Bank Stock, the 9572*l.* per annum Long Annuities, and 750*l.* per annum Short

{(1) Cited 4 Mass. Rep. 154.}

1802. Annuities, to the *Accountant-General*, in trust in the cause; and that the said funds, when so transferred, should be sold

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* with his privity; and that the money to arise by such sale should be laid out in the purchase of 3 *per cent.* Annuities, in trust in the cause, subject to further order; and that the Master should appropriate a sufficient part of the said Bank Annuities, when purchased, to answer the growing payments of the several annuities; and that as any of the annuitants should die, the

[* 139] funds appropriated respectively, should fall into the general residue; with liberty to apply; and it was ordered, that the interest of the residue of the said Bank Annuities after such appropriation, and also the interest and dividends of the said 4320*l.* Bank Stock, should be paid to the plaintiff Lady *Anne Conolly* for her life; and on her death any person or persons entitled thereto were to be at liberty to apply; and after providing for the costs out of the balance of the personal estate, and for the arrears of the annuities out of the sum of 2067*l.* 6*s.* 1*d.* the balance of the interest and dividends received by the executors, and ordered to be paid into the bank, it was ordered, that the remainder should be paid to Lady *Anne Conolly;* and also, that 1846*l.* 9*s.* 7*d.* cash in the bank, which had arisen from interest of the funds, in which part of the testator's personal estate had been invested, should be also paid to her; and that the dividends of 24,619*l.* 4*s.* 10*d.* 3 *per cent* Bank Annuities, in which the sums received by the executors from the personal estate had been invested, should from time to time be paid to her during her life; and on her death any persons claiming to be entitled were to be at liberty to apply; and it was ordered that the executors should get in the outstanding personal estate; and that so much thereof as should consist of interest, should be paid to Lady *Anne Conolly;* and so much as consisted of principal should be paid into the bank, subject to further order.

[140] The Master's further report, dated the 10th of *December*, 1796, stated, that the Bank Stock and the Long and Short Annuities had been sold; and the produce laid out in 3 *per cent.* Annuities.

Upon the death of the plaintiff Lady *Anne Conolly* the suit was revived by her executors; and the cause coming on before Lord *Alvanley*, then Master of the Rolls, for further directions on the subsequent report, it was insisted on the part of *Mr. Byng*, that Lady *Anne Conolly* had received for interest and dividends, accrued on the Bank Stock, and the Long and Short Annuities, and the produce thereof laid out in Bank 3 *per cent.* Annuities, large sums more than she was entitled to, if those funds had been sold, as they ought to have been, immediately after the testator's decease, and the produce invested in a permanent fund, viz. the 3 *per cent.* consolidated Bank Annuities. The Master of the Rolls directed inquiries with reference to that question between the executors of Lady *Anne Conolly* and *Mr. Byng* and the other parties interested in the residue of the personal estate; with liberty to present a

petition to rehear the order of 1796, as to the payments thereby directed to be made to Lady *Anne Conolly*.

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The rehearing was argued before Lord *Rosslyn*: but no judgment was given.

Mr. Mansfield, Mr. Lloyd, Mr. W. Agar, Mr. Wingfield, Mr. Serjeant Palmer, Mr. Bell, and Mr. Richards, for different parties, in support of the Petition of rehearing.

The tenant for life of such funds as Bank Annuities, carrying a higher interest, and Long and Short Annuities, * wearing out rapidly, are not entitled to the enjoyment of them in specie: but there is a standing rule of the Court for the benefit of all parties interested, that those funds shall be laid out in the more equal fund, the 3 *per cents.* No party ought to suffer by the circumstance, that what ought to have been done, and what the Court would have directed to be done, immediately on the testator's death, was not done. The state of this question is, that the late Lord Chancellor went out of office without having delivered any opinion upon the point; and Lord *Alvanley* thought, he could not decide against the order of the Lord Chancellor; supposing his Lordship to have been of opinion, that there was something particular in this will, upon the distinction between the gift of a general residue for life, with remainder over, and a specific bequest of this sort of property; in which case it could not be sold, and the dividends follow of course from the death of the testator; even the rule, that takes place in general legacies, postponing the payment of interest to the end of a year from the death, not attaching upon it. But there is nothing specific in this will. This is a mere gift of the residue of the personal estate for life, subject to the payment of debts, legacies, and annuities. Under every such will the Court has always sold this sort of property; if there was any wearing out fund, not specifically given, or any fund, as to which the tenant for life had an advantage over those in remainder. (*a*) This is to be found in every decree; and is so familiar, that no report of such a case is to be met with in print. *Cranch* v. *Cranch*, (*b*) *Powell* v.

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(*a*) *Gibson* v. *Bott*, *Ante*. {*p.* 89.}

(*b*) *James Cranch* by his will, dated the 22d of *June*, 1791, after several legacies to his children, gave the residue of his money, lands, tenements, goods, chattels, or estates, to his wife for life, and after her death to be equally divided among his children, who should be living; and appointed his wife executrix.

Decree for an account, such part as was already invested in government securities was to be transferred to the *Accountant-General*; and the executrix admitting, that 3943*l* 13*s*. 9*d*. 5 *per cent.* Bank Annuities, was standing in her name, it was ordered, that the same should be transferred, &c.: and the dividends paid to her for life; with liberty for the plaintiffs to apply at her decease.

The Master's Report, dated the 11th of *July*, 1797, stated, that the personal estate consisted of leasehold premises.

By an order, dated the 24th of *July*, 1797, it was among other things ordered, that the 5 *per cent.* Bank Annuities should be sold, and the money laid out in 3 *per cent.* Annuities; the interest to be paid to her for life; with liberty to the parties interested in the residue after her death to apply. An inquiry was directed, whether it was for the benefit of the person entitled to the clear residue of the personal estate to have the leasehold premises sold; and if it would be for their benefit, it was ordered, that they should be sold; and that the money should be laid out in the 3 *per cents.*; the dividends to be paid to her for life, with liberty to apply after her death.

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Cleaver, (a) and other cases, have been selected; proving the invariable rule to sell Bank Stock, Long and Short Annuities, Leases, &c. when the Court is informed by the record of the nature of the property. The consequence is, * the residuary legatee is not entitled to any thing, till the debts and legacies are paid, and the residue ascertained. An objection has frequently been made by an annuitant, when the executor has desired to pay the fund into court, that it would stop the in- [* 143] terest. But an executor makes those payments at his peril. The Court has sometimes ordered the interest to be paid to the tenant for life: but that must be considered to have been without prejudice. In the instance of a Short Annuity the tenant for life would wear out the thing. Some certain rule must be established. The rights of the parties must be the same, as if the testator had converted the property immediately before his death. That or some other definite time must be fixed by the Court. It cannot depend upon the account, the acting of the executor, &c. The possibility of collusion between the tenant for life and the executor must be attended to. Suppose the executor was himself tenant for life.

Mr. Romilly, and Mr. Trower, for the Executors of Lady Anne Conolly, in support of the Decree.

The first question is, whether Lady *Anne Conolly* was en- [144] titled to the annual produce of the personal estate at the death of the testator: If not, the next consideration is, whether, the executors having paid it to her, and particularly the dividends of the bank stock, those payments ought to be called back.

The personal estate is given to her for life specifically. As this disposition is expressed, it is the same as if the testator had enumerated the particular articles, of which the personal estate consisted. He has not given his personal estate to his executors, in trust to sell, &c. and that what remains shall be

(a) *John Powell* by his will, dated the 8th of *August*, 1775, devised all his manors and real estate to *Cleaver* and others for 99 years, remainder to *Arthur Roberts*, and his first and other sons in tail; remainder to *William Roberts* and his first and other sons in tail male; remainders over; and he directed his trustees, whom he also appointed his executors, to lay out the residue of his personal estate in the purchase of lands, to be settled to the same uses.

The bill was filed by the first tenant for life; and the usual decree was made. By an order, dated the 21st of *January*, 1788, 552*l*. 3*s*. 9*d*. Long Annuities, and 3000*l*. India stock, standing in the testator's name at his decease, were directed to be sold, and the produce laid out in 3 *per cent*. Annuities: and as to 33,610*l*. Bank 4 *per cent*. Annuities, and 28 897*l*. Bank 5 *per cent* Annuities, an inquiry was directed, whether the fund of the testator's estate would be in a better condition by selling the same, and investing the produce in 3 *per cent*. Annuities; and the Master certifying, that it would, an order was made on the 21st of *May*, 1788, for the sale of those funds and investing the produce in the 3 *per cents*.

Elizabeth Hoadley by her will bequeathed the residue of her personal estate to *Dr. Ashe* for life, and after his decease to be divided among his children, to the sons at the age of twenty-one, to the daughters at that age or marriage.

An order was made, that 11,800*l*. Bank 5 *per cent*. Annuities should be sold, and the produce laid out in the 3 *per cents*.

Similar orders were made as to 5 *per cent*. Annuities, in *Chancey* v. *Rees*, *Tappin* v *Lovewell*, and *Dagley* v. *Leake*; and in *Griffiths* v. *Grieve*, as to 4 *per cent*. Annuities; and in *Barthelomon* v. *Scholey* as to Short Annuities.

given to those persons: but he has given the personal estate to them specifically: as he has given the land. The Lord Chancellor considered, that there was nothing in the will, which made it necessary for the executor to convert this property into any other fund. For many purposes a bequest of all the personal estate is considered specific; for instance, upon the question of exoneration, where there is a charge of debts. There is no doubt of the general rule: but this question does not depend upon it. In the case put by your Lordship, of a man having an annuity for the life of *A.* and bequeathing his personal estate to *A.* for life, remainder to his son, there was a clear intention, that it should be sold. But suppose, he had expressly described the annuity: however absurd, it must be considered specific. If the only property was 40*l.* a-year, barely sufficient for a maintenance, and clearly intended for that purpose, upon this principle the rule must extend to that case. The rule is founded in convenience: but there is no fixed principle, that executors are bound of necessity to make the conversion at the testator's death or any given time afterwards. The executor ought not to change a permanent fund producing a larger interest to another producing a smaller, if such conversion is not required for the payment of debts. The habit is to do it, when the executor is called into this Court: not where he is not called upon, and no question [145] is raised. If he is liable to question for not doing so, it must be upon the principle of *Devastavit*. The consequence will be, that there will be no possibility of executing a will without the direction of the Court, if, though not called upon by the remainder-man, he must do it at his own peril immediately. No given period has been ascertained, after which the remainder-man shall have a right to call upon him. The Court makes the conversion, but does not consider the executor as having done wrong in not having converted. No instance can be found, where it has come into Court several years after the death, and the executor has been charged. The period of the conversion in this instance at all events ought to be, not the time of the testator's death, but the year 1796, when the order was made; for it was competent to them to call upon the executor at a prior time.

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The second question is of considerable novelty; as to what is to be done with the dividends received, particularly upon the bank stock. With reference to the bank stock, as distinguished from the annuities, no case has established, that the executor had done wrong by paying to the tenant for life the interest of some permanent fund, though producing more than if the property was vested in the 3 *per cents.*; and, to make this party account for what she has received, that proposition must be made out. This must have often occurred. A considerable part of the property might have been out upon securities at 5 *per cent.* If the tenant for life, to whom the interest was paid by the executor, died insolvent, would that be a *Devastavit?* No such decree was ever made. Upon that

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hypothesis it would be necessary for the executor immediately to call in all the securities, bank stock, India stock, mortgages, &c. and to invest the whole in the 3 *per cents*.

[*146] *The *Lord* CHANCELLOR desired the counsel in reply not to trouble himself upon the point, whether the bequest was specific, and to advert to the bank stock.

Mr. Mansfield, in Reply.—In this respect there is no difference between the bank stock and the annuities. The price is perfectly accidental; and is never considered. The Court says, 1st, Bank stock is the stock of a trading company, not a government fund, secured by the legislature. The former also produces a high dividend, and is therefore more liable to fluctuation and uncertainty. For these reasons this Court never suffers those funds to remain; which is considered hazardous, and to a certain extent wasteful. The tenant for life cannot have any more right to advantage in the shape of that large dividend than of Long and Short Annuities. The Court goes further; ordering the conversion of 4 *per cents.* a government fund; probably on the principle, that they are liable to be redeemed, and not so permanent a fund. With respect to refunding, these are trustees. Their conduct cannot affect the rights; and it happens, that there are dividends now due to Lady *Anne Conolly* in Court, which if the decision is against her, the executors have no objection to apply to the refunding, if it is to take place. If an executor had ignorantly and honestly made the payment, the Court would be unwilling to call upon him: but is there a doubt that the person receiving the payments would be called on? In a few years more these Short Annuities will expire. Suppose the whole property was in these circumstances. It does not very frequently happen, that any payment is made upon the residue before the interference of the Court; which prevents this accident. Several orders may however be found. In *Holder* v.
[147] *Holder*, (*a*) an account was directed of all the excess, that had been received of Short Annuities, beyond 4 *per cent*.

Lord CHANCELLOR.—No question arises upon this will, except, whether this is a specific bequest of such personal estate as was the testator's at the time of his death. Lord *Rosslyn* is represented to have had considerable doubt, whether it was not specific; and if it is, I agree, not only Lady *Anne Conolly* up to the date of the decree, but afterwards, and *Mr. Byng* and the other persons in remainder, must take the specific produce of what is specifically given. But if it is so to be considered, the decree is not correct; considering the bequest specific to the date of that decree, and no longer. It is wrong therefore in any way.

Upon the question, whether this is specific, it must be either upon the words describing the personal estate, or upon the construction of those words, coupled with the devise of all his

(*a*) In Chancery, *May*, 1789.

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Every devise of land must of necessity be specific, whether in particular or general terms: otherwise as to personal property. (1)

landed estates. With respect to the latter, every devise of land, whether in particular or general terms, must of necessity be specific from this circumstance; that a man can devise only what he has at the time of devising. Upon that ground in a case at the Cockpit it was held, that a residuary devisee of land is as much a specific devisee as a particular devisee is. But it is quite different as to personal estate. The question must be, did he mean to dispose of what he had at the date of the will, or of that, which he should have at his death? If he meant the former, then every part of that identical personal estate, which is disposed of between the date of the will and the death, is a legacy adeemed: *pro tanto* it is gone. If the question is, whether those subjects, to be acquired between the date of his will and his death, should pass, I cannot say, he did mean that. (2) If not, it can only be specific * thus; that the persons to take the personal estate he should have at his death in different interests should enjoy it as he left it. Not one word of this will goes to that. It is given as all his personal estate, and the mode, in which he says it is to be enjoyed is to one for life, and to the others afterwards. Then the Court says, it is to be construed as to the perishable part, so that one shall take for life and the others afterwards; and unless the testator directs the mode so that it is to continue, as it was, the Court understands, that it shall be put in such a state, that the others may enjoy it after the decease of the first; and the thing is quite equal; for it might consist of a vast number of particulars: for instance, a personal annuity, not to commence in enjoyment till the expiration of twenty years from the death of the testator, payable upon a contingency, perhaps. If in this case it is equitable, that Long or Short Annuities should be sold, to give every one an equal chance, the Court acts equally in the other case; for those future interests are for the sake of the tenant for life to be converted into a present interest; being sold immediately, in order to yield an immediate interest to the tenant for life. As in the one case that in which the tenant for life has too great an interest, is melted for the benefit of the rest, in the other that, of which, if it remained in specie, he might never receive any thing, is brought in; and he has immediately the interest of its present worth. [* 148]

As to the Annuities charged upon this estate, the tenant for life, if entitled to the whole, would be properly paying out of the aggregate property the Annuities. But it would be great injustice to those in remainder, if these capital sums were paid out of that part of the bulk of the property, which does not consist of perishable interests; and were not to be thrown in proportion upon the perishable part. The ordinary rule of apportioning requires, that in some degree a provision should be made out of those, the Short Annuities, if they remain, and not out of the 3 *per cents*. only. [149]

{ (1) *Wyman* v. *Brigden*, 4 Mass. Rep. 134.}
{ (2) See 3 Johns. Cha. Rep. 310.}

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To exempt the personal estate from the debts there must be declaration plain or manifest intention.

The cases alluded to, where personal estate has been taken to be specifically given, do not apply. First, where a residuary legatee takes it as a specific gift, not subject to debts, the inference, that he is to take that personal estate, is not made in general cases upon the bequest of all the testator's personal estate, but upon the effect of that, connected with what arises out of other parts of the will, with regard to the intention to fix upon other funds charges, that would primarily fall upon that fund; and that must be made out, not by conjectures, but by declaration plain or manifest intention. (a) That is the principle, upon which it is agreed these cases are to be construed; and the intention has never been considered manifest merely from a disposition of the personal estate in the same clause with land; which must be taken to be specifically given. But those cases do not go the length, that, if the enjoyment is portioned out in life interests, with remainders over, it is specific. I am clearly of opinion therefore, that this is not a case, in which the personal estate is in this sense specifically given, with a direction, that it shall remain specifically such as it was at the testator's death; and the purposes, for which it is given, are those, for which it is admitted there is a general rule, that these perishable funds are to be converted in such a way as to produce capital bearing interest.

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I was astonished when that was doubted, from general recollection. I had considered the practice to be, that the first moment the observation of the Court was drawn to the fact, the Court would not permit property to be laid out, or to remain upon such funds, under a direction to lay it out in Government securities; but would immediately order it to be converted into that which the Court deems, for the execution of trusts, a Government security. I pass over what has been said as to real securities; for there is a great difference between real securities, or Bank stock, for instance, and Government securities. Bank stock is as safe, I trust and believe, as any Government security; but it is not Government security; and therefore this Court does not lay out, or leave, the property in Bank stock; and what the Court will decree it expects from trustees and executors. I will not state, what the Court would do, where executors had not made these conversions. That depends upon many circumstances. But I abide by Lord *Kenyon's* rule in the case of *Mr. Champion*, an executor, before which time it was doubted, whether an executor could lay out the property in the 3 *per cents.* (1) Lord *Kenyon*, who was a repository of valuable knowledge, produced a *dictum* of Lord *Northington*, that the Court would protect an executor in doing what it would order him to do. The Court in this case would order him to do that. It is not so in the case of a mort-

The Court will protect an executor in doing what it would order.

(a) See *Gray* v. *Minnethorpe*, *ante*, vol. iii. 103. *Hartley* v. *Hurle*, *ante*, vol. v. 540, and other cases there referred to.

{ (1) See *M'Call* v. *Peachy's Adm.* pl. 3, 4, 5, 6. 3 Munf. 288, and *Morton et ux.* v. *Smith*, 1 Desaus. Cha. Rep. 128.}

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-age.' The Court would not permit a real security to be called in without an inquiry, whether it would be for the benefit of every person; and it is accident, that some part of the assets will produce more interest than a genuine trust security. In some instances there is little doubt, it may be not only for the benefit of the tenant for life but for the substantial interest of the remainder-man that the property should not be shifted from a good real security.

The question then is, whether the Court will change the fund, not as between the remainder-man and the executor, [151] but in a question between the tenant for life and the remainder-man; and the question with the executor cannot well arise, so as to be acted upon, till a failure by the tenant for life, or those, who represent him; for the justice of the case, if the tenant for life has received so much, would be, that he should bring it back in case of the executor; who paid him. If the rule is, that the fund shall not remain, it is impossible to say, the date of the decree shall decide. I do not like to put it upon the possibility of collusion: but that is not to be totally neglected; for it may happen, that the executor himself may be the tenant for life; and then he has an interest in delay. Of necessity there must be great delay, before there can be a final decree in a cause of great property; and it may be very much protracted, where there is an interest. However I do not put it upon that. But, if the principle is, that the Court, when its observation is thrown upon it, will order the conversion, it ought to be considered to all practicable purposes as converted, when it could be first converted. That is the genuine inference from the other principle. If the Court has ever attended to the difficulties, often thrown before it, with regard to perishable property of other kinds, as leasehold estate, &c. *(a)* it never has as to stock. You can learn the price, at which it might be converted on any day; and the moment the Court was ordered by the Legislature to lay out its funds in stock, it necessarily held, that for this purpose stock must always be considered of the same value. It is for the benefit of the creditor, that it should be thrown into a lasting fund; and it is equal to all the parties interested. As to bank stock, the Court has ordered 4 *per cents.* and 5 *per cents.* to be sold and converted into 3 *per cents.* upon this ground; that, however likely, or not, that they may be redeemed, the Court looks [152] at them as a fund, that is not permanent, though it may remain for ever; and considers, that from that quality there is an advantage to the present holder; who gets more interest, because they are liable to be redeemed. I do not know, whether the reasoning is as just in practice as it is in theory. Property cannot be laid out by this Court in bank stock in the execution of a trust to lay it out in government securities; for it is not a government security. Converting that therefore the execu-

The Court in laying out money in the funds does not attend to the difference in the price of stock.

(a) *Gibson* v. *Bott, ante,* 89.

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tors would have done what this Court would have ordered; and that falls under the same consideration; and the advantage, if any, ought not to accrue to the tenant for life. The account therefore must go as to that, as well as the Long and Short Annuities, from the time, at which it would have been converted, if the observation of the Court had been drawn to the fact, that the executors were possessed of those funds.

This petition of rehearing is therefore well founded.

ROLLS, 1801. *June* 15, 16. 1802. *May* 24.

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Transfer by an executor, a clear misapplication of assets, immediately after the death, to secure a debt of the executor and future advances, under circumstances of gross negligence, though not direct fraud, set aside by general legatees. (1)

JOHN SMITH, by his will, dated the 18th of *January*, 1785, among other legacies, gave to *Jane Pearson* the sum of 200*l*. to be paid to her immediately, or as soon as possible on the death or marriage of his wife *Elizabeth Smith;* and he left *Charles Rushworth* 50*l*. to be paid at the death of his said wife; and he appointed *John Lush* and his said wife *Elizabeth Smith*, executors. The testator died on the 23d of *May*, 1785; and his widow and *Lush* proved the will. *Lush* died on the 26th of *January*, 1796; and on his death *Elizabeth* * *Smith* possessed herself of all the personal estate of her late husband.

Elizabeth Smith, by her will, made in 1790, directed all her debts, funeral expenses, and the expenses of the executors, to be paid; and, subject thereto and to her late husband's will, she gave, devised, and bequeathed, all and every the monies, real and personal estates, securities for money, goods, chattels, and all other her estate and effects, to her nephews [* 153] *Joseph Simpson*, *William Thorley*, and *Henry Wright*, and to the survivors and survivor of them, their and his executors and administrators; upon trust to convey the freehold property, consisting of two messuages, to her two nephews *John Simpson* and *James Simpson;* with remainder over to *Joseph Simpson;* and after giving some legacies she appointed *Joseph Simpson*, *Thorley*, and *Wright*, her executors.

Elizabeth Smith died on the 5th of *April*, 1797; leaving *Joseph Simpson* her heir at law; who alone proved her will; and possessed himself of her real and personal estates, and of part of the personal estate of *John Smith*. At her death there were standing in the name of *John Smith* in the books of the Bank of *England* 50*l*. 5 *per cent*. Navy Annuities: 275*l*. 4 *per cent*. Consolidated Annuities: 60*l*. Short Annuities; and 550*l*. 3 *per cent*. Reduced Annuities; which fund, *Simpson* transferred to *Moffatt* and Co. his bankers, as a security for such sums as he then owed, or might afterwards owe them. In 1798 a commission of bankruptcy issued against him.

{(1) See *Saxon et ux*. v. *Barksdale et al.* 4 Desaus. Cha. Rep. 522, and observe the reasoning of Chancellor *Desaussure*, and the cases cited by him. See also *Glass* v. *Baxter*, 1 Desaus. Cha. Rep. 153.}

Thomas Hill married *Jane Pearson;* and they and *Rushworth*, who was then an infant, filed the bill against *Simpson* and *Wright*, *Thorley* being dead, and against the assignees and the bankers; praying, that it may be * declared, that the funds transferred by *Simpson* to the bankers, are liable to the legacies of the plaintiffs, &c.

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The defendants *Moffatt* and Co. by their answer stated, that about *February*, 1794, the defendant *Simpson* opened an account with them as bankers; which continued till his bankruptcy; in the course of which he drew a great number of bills on them; and was always or for the most part in their debt on the balance of such account; for which they repeatedly pressed him; and frequently refused to accept and pay his bills, until he remitted money to discharge or lessen such balance; and informed him, they would not continue such account; unless he made remittances to answer his bills. On the 11th of *May*, 1797, he was indebted to them 399*l.* 18*s.* 5*d.* besides other bills, which they had accepted for him, not then due; and he called upon them; and represented, that he was under the necessity of providing a very large sum of money immediately; and requested them to advance it; and to induce them to do so offered to transfer the funds mentioned in the bill as a security as well for the balance then due, as also what they should advance to him for his then occasions, and also all other sums, which they should at any time hereafter pay on his account; and these defendants having at the earnest solicitation of *Simpson* agreed to advance the money, which he had then immediate occasion for, he on the 11th of *May*, 1797, transferred to them 100*l.* 3 *per cent.* Consolidated Annuities, and the several sums of stock mentioned in the bill. The 100*l.* 3 *per cents.* were then standing in the names of *Lush* and *Elizabeth Smith;* and all the other funds in the name of *John Smith;* which the defendants knew, by reason that at the request of *Simpson* they received the dividends under a power of attorney granted by *Elizabeth Smith;* which they always placed to the credit of *Simpson's* account with them. [155]

They denied, that they knew, or suspected, that the funds were not at the time of the transfer the absolute property of *Simpson* as executor or devisee of *Elizabeth Smith;* that they were part of the personal estate of *John Smith:* on the contrary they believed, they were *Simpson's* own property; and he represented to them, that he was absolutely entitled thereto, subject only to an annuity of 20*l.* to *Elizabeth Smith's* sister during her life, and to a few very small legacies; that he had full right to dispose thereof, and would have disposed but for the low price of the funds; which he expected would rise. They also stated, that they did not know, any of the legacies of *John Smith* to the plaintiffs or any other person were unpaid. The answer then set forth a letter from him to them, dated the 20th of *April*, 1797; stating the death of *Elizabeth Smith;* that she had left him the whole of her property, both real and personal, paying 20*l.* a year to her sister

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for life, then seventy-six years old, and a few very small legacies; that he intended to be in *London* by the 28th; supposing her will must be proved in *London*, on account of the money in the funds; and stating his intention to produce the will to them, before he should do any thing, as being well assured, they would advise him for the best to save expense.

The answer then stated, that in consequence of the said transfer, and upon the faith, credit, and validity thereof, the defendants on the 13th of *May*, 1797, paid bills and notes on account of *Simpson* to the amount of 673*l.* 1*s.* 6*d.* then outstanding; which they believe was the sum or part of it, which he was anxious to provide for. On the 16th of *February*, 1798,
[156] he gave the defendants the following authority in writing.

"Messrs. *Moffatt*, *Kensington*, and *Styan*, *London*, 16th "*February*, 1798. Gentlemen, having some time back trans-"ferred into the name of your partner *Mr. John Pooley Ken-"sington* sundry sums of different stocks and annuities as a "security for any advances or engagements, which you might "at that time have come under, or might at any future time "come under, for me, I hereby authorize you to sell or other-"wise dispose of the same, whenever you may think proper, "at my risk, and for my account; and I will confirm and ap-"prove of the same; and will, whenever required by you, exe-"cute a legal instrument to that effect. *Joseph Simpson.*"

The answer further stated, that upon the faith of the said transfer and security of the said funds, the defendants did, after such transfer, and on the credit thereof, pay the bills of *Simpson* to a much greater amount, and suffered him to be in arrear to defendants in a much larger balance than they had before done; insomuch, that on the 21st of *June*, 1798, when *Simpson* became bankrupt, he was indebted to defendants on the balance of accounts in 1435*l.* 19*s.* 6*d.* They never had any other security; except, that *Simpson* and *Elizabeth Smith* executed a bond to them, dated the 22d of *December*, 1795, for securing any balance, which might be due from *Simpson* in account between him and them, and the bills, drafts, and notes, paid to them as his bankers; and which, when received, they placed to the credit of his account with them.

The answer was replied to; but the plaintiffs did not go into evidence.

Mr. Cox, and Mr. Fonblanque, for the Plaintiffs.—Mr. Stanley, for Defendants in the same interest.

[157] This is a question of dry law; whether executors can pledge the fund they hold in that right for their own debt. Upon the answer of the bankers there is a distinct admission of the situation of *Simpson*, before these funds came to him; that they repeatedly dishonoured his bills, until they got from him this security, evidently the only one he could give them: no real consideration passing. Can they then avail themselves of that, which was a clear misapplication of the assets? It is now settled, particularly in the late case of *Farr* v. *Newman*, (a)

(a) 4 *Term Rep.* 621.

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in which the subject was much discussed, that goods, which come to a man as executor, are for many purposes distinguished from his own. It was therefore determined in that case by three Judges against the opinion of *Buller*, Justice, that the goods of the testator cannot be taken in execution for the debt of the executor. The point was very fully considered by Lord *Kenyon*, whose experience in this Court made him competent to consider the cases on this subject decided in Equity, which are very numerous. The decisions, that an executor may sell the assets, and the purchaser shall not be bound to see to the application of the money, may be laid out of the case. A direct application of the assets cannot be impeached: a power of sale being necessarily inherent in the character of executor, and in that case it would be enormous to bind the purchaser. This is not a sale, but a transfer by way of pledge, as a security for an antecedent debt, contracted before these legacies were due, and also sums, for which they were then under acceptance, and such sums as they should advance. It has been also determined, that an executor may become the purchaser for his own use of the assets by discharging debts or legacies of equal amount. (1) But in this instance it must be contended, that, though this executor has not made any such advance, yet as by possibility he might, therefore upon this transfer to them for a debt of his own, [158] they are as much discharged from any obligation of inquiry into that fact, as if they were purchasers of these funds in the common course.

First, to consider the general proposition. In the case of a pledge the person taking the pledge is bound to see to the account; in other words he takes it subject to the chance; the transaction not having in itself a direct appearance of the administration of the assets. No purpose of justice can be answered by establishing a rule the other way to the extent of a pledge. The power of sale is sufficient for the purpose; as much as general convenience requires; without going the length of establishing, that a person, to whom the executor has pledged the assets, shall hold them discharged, on account of the possibility, that he may have made advances. Certainly that is not the natural way of dealing with assets; particularly, if the pledge is for a debt antecedent to any interest of his in the estate. It has been determined, that an agent or factor with power to sell cannot pledge for his own debt: *Paterson* v. *Tash.* (a) *Daubigny* v. *Duval.* (b) *De Bouchout* v. *Goldsmid.* (c) What is the power of the executor beyond that of the agent? He is acting equally *ex mandato*. The only cases favourable to such a doctrine are *Nugent* v. *Gifford*, (d) and

(a) 2 *Str.* 1178. (b) 5 *Term Rep.* 606. (c) *Ante*, vol. v. 211.
(d) 1 *Atk.* 463. Cited 2 *Ves.* 269. Stated from the Register's book by the Master of the Rolls, 4 *Bro. C. C.* 136, in *Andrew* v. *Wrigley*.

{(1) *Livingston* v. *Newkirk*, 3 Johns. Cha. Rep. 318.}

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Mead v. *Lord Orrery*.*(e)* The former is a short report in *Atkyns;* and it may be doubted, whether the law was laid down so generally as is there represented. From *Mead* v. *Lord Orrery*, Lord *Hardwicke* does not appear to have considered *Nugent* v. *Gifford*, which occurred shortly before, as having
[159] decided the dry point so generally; but gave his opinion much at length; and evidently relied on the many particular circumstances, the recital of the mortgage, the concurrence of the executors, &c.; plainly not satisfied, that it was a clear proposition, that the executor might dispose of the assets just as he thought fit. Even those cases make an exception of any thing like fraud; and an application in a way, that cannot by possibility answer any of the purposes of the will is *primâ facie* evidence of fraud. There is reason to believe, that the point in *Nugent* v. *Gifford* was, whether the parties interested under the settlement had not that sort of specific lien, that controlled the general power of the executor.

But these two cases by no means stand unimpeached. In *Bonny* v. *Ridgard*, *(a)* Sir *Thomas Sewell* gave the relief these plaintiffs pray; and Lord *Kenyon* upon a rehearing, finally decided upon the length of time; though from the importance of the points he gave his opinion upon them, and directly against *Mead* v. *Lord Orrery;* observing, that all the cases except that are to be distinguished; but not taking notice of *Nugent* v. *Gifford*. He admitted, that an executor may trust a person, whom the testator trusted; *(b)* but said, if the transaction is for any improper purpose, it cannot stand. In addition to this very considerable authority, the point was much considered by Lord *Thurlow*, in *Scott* v. *Tyler;* and though it was compromised as to that, it has always been understood, that Lord *Thurlow's* opinion was against the banker's. *(c)*
[160] *Andrew* v. *Wrigley* *(d)* also, though the decision turned upon the length of time, shows Lord *Alvanley* was more inclined to follow *Bonny* v. *Ridgard* than the cases before Lord *Hardwicke*.

The reversal of the decree in *Humble* v. *Bill* *(a)* in the House of Lords, and *Crane* v. *Drake*, *(b)* were considered as having determined the law up to the time of *Nugent* v. *Gifford*. *Elliot* v. *Merriman* *(c)* is so full of specialties, and so completely depends upon the particular circumstances, that it cannot furnish a general rule. Can it be supposed, that the Court would in that case have resorted to the particular circumstances, if a general rule had been established in *Nugent* v. *Gifford*, only two years before? Lord *Hardwicke's* anxiety, in the subsequent

(e) *Atk.* 235.
(a) p. 159. Stated 2 *Bro. C. C.* 438, in *Scott* v. *Tyler;* and more fully in *Andrew* v. *Wrigley*, 4 *Bro. C. C.* 125. *Mr. Cox* cited it from his own MS. note.
(b) *Rowth* v. *Howell*, *ante*, vol. iii. 565.
(c) This appears to be correct by the Report since published from Lord *Thurlow's* written judgment, 2 *Dick.* 712.
(d) 4 *Bro. C. C.* 125.
(a) p. 160. 2 *Vern.* 444. 1 *Bro. P. C.* 71. *(b)* 2 *Vern.* 616.
(c) *Barnard. Ch. Rep.* 78. 2 *Atk.* 41.

cases, to select the special circumstances is perfectly inconsistent with the notion, that he had drawn any such general conclusion. In *Taner* v. *Ivie*, *(d)* his Lordship anxiously disclaims any such general principle; and puts it upon collusion.

Next, upon the particular circumstances of this case, can these bankers in any way be considered as having taken these funds in the due administration of the assets? He first opened an account with them in 1794: they repeatedly dishonoured his bills: they thought fit to rely on his assertion, that he was entitled, subject only to a few small legacies: they take a transfer from the name of the original testator *John Smith*; to whose will the property is expressly made subject by the will of his widow; the transaction taking place immediately upon her death; the will submitted to them by him with a view to their advice. The circumstances exclude the only inference, that could avail them, that he might have been a creditor upon the assets by previous advances. Under such circumstances, approaching nearly to what Lord *Hardwicke* calls, a contrivance for a *devastavit*, notwithstanding the difference between executors and trustees, all the consequences, that would attach upon the latter, will attach upon the executor and the persons dealing with him. [161]

Mr. Piggott, and Mr. Trower, for the Defendants, the Bankers.—These defendants have taken a transfer from the person having the legal right to make it. They are therefore legally entitled; and can be dispossessed only by some clear, distinct, equity. The utmost extent of the expressions of Lord *Kenyon*, and Lord *Alvanley*, is, that the plaintiffs might have been relieved, if they had come in time. The cases, with some few exceptions, are cases of specific legatees; having an inchoate title; liable to be defeated only by debts. These plaintiffs are mere pecuniary legatees, not having a charge on any specific fund. The death of the testator, under whom they claim, took place thirteen years before the bankruptcy that has produced this bill. It was perfectly competent to them to file a bill to have the fund secured. Upon the death of *Mrs. Smith*, in 1797, the estate was to be represented by another person; and still no bill was filed, nor upon the transfer, or the authority to sell, given in 1798. Then upon the bankruptcy this attempt is made. Then, as to the consideration, it is supposed the advance could have no connexion with the estate and the satisfaction of the demands upon it; that it was a desperate debt from this executor to the bankers. That is by no means the fair result of the answer. They paid the utmost value of this stock within two days after the transfer. It is true, they had supplied him with money; he owed them about 300*l.*; and they took it, to secure that debt, and to cover future advances; and two days after they advance 600*l.*; and go on making payments, till the debt amounts to nearly 1500*l.* far exceeding the whole value of this stock. How then can it be called a [162]

(d) 2 *Ves.* 466.

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security for a desperate debt without any real consideration passing? In substance it is a sale for valuable consideration. The only occasion of his mentioning the will, was to ask their advice upon the probate. It was not necessary for the bankers to see the will for the purpose they were then transacting; nor does the answer say, they did see it. Put the case of an executor expecting a rise of the funds in a week; and therefore refraining from a sale; and pledging the stock: has the person putting the money into his hands any means of knowing, how it is to be applied; whether he has advanced more; whether he wanted it for the purposes of the testator? How can he travel into that? Is it sufficient that a third person, some time afterwards, says, he will show it could not be wanted for the purposes of the testator; that all those purposes are satisfied? Upon such terms how can any one deal with safety as to property so circumstanced? Consider the consequences, if no person can take from an executor a transfer of property in the funds, now grown of such magnitude, without being subject to be thus called upon.

The case of a specific legatee is evidently distinct. The object of the executor is not to convert a specific legacy, but to convert all the other assets into money. It is admitted, that if land is devised subject to a particular charge, the purchaser must see to the application: not if it is subjected to debts generally. The former instance has no analogy to this; the land being specifically charged by the testator. The final de-[163]cision of *Humble* v. *Bill*, reversing the decree of Sir *Nathan Wright*, for a great while was not acknowledged as the Law of the Court; and was disapproved by Sir *Joseph Jekyll*, in *Ewer* v. *Corbet*, (a) confirming Lord *Hardwicke's* opinion. From the great increase of personal property the inconvenience, upon grounds of public policy, of involving a purchaser in the accounts of the testator's estate, must have been foreseen by those great men. But in *Humble* v. *Bill* there was not a general charge upon the personal or real estate, but exclusively upon that particular subject, a printing-office. That decision therefore is nothing more than that a prior mortgage must be preferred to a second. But all these cases are answered by *Nugent* v. *Gifford*, and *Mead* v. *Lord Orrery*: those cases certainly excepting positive and actual fraud. The later cases do not impeach Lord *Hardwicke's* general doctrine; stating only, that in *Mead* v. *Lord Orrery* it went too far; the pledge being for a debt, with which the testator's property had no connexion. In *Ewer* v. *Corbet* any responsibility of the purchaser is utterly and unequivocally reprobated. In *Farr* v. *Newman* the goods of the testator were remaining in specie in the possession of the executor; a creditor of the testator pressing at the same time: two executions on the same day: the executor living in the testator's house; and using his furniture and goods: no third person intervening: no act done

(a) 2 *P. Will.* 148.

by him upon those goods, so in his possession. In *Whale* v. *Booth*, (*b*) there cited, Lord *Mansfield*, who had assisted in all these cases before Lord *Hardwicke*, says, there is but one exception to the general rule, that an executor may dispose of the assets and they cannot be followed; the case of collusion; which was the opinion of Lord *Hardwicke* and Sir *Joseph Jekyll*. In *Elliot* v. *Merriman* the bill was dismissed with costs in favour of the general power of an executor over the assets. In *Farr* v. *Newman*, *Buller*, Justice, certainly overruled by the rest of the Court, states the proposition up to this; that the property of the executor is absolute. He certainly has a property for paying the debts and legacies. The rule is founded in great good sense and policy. Trusts must be reposed; and those claiming under the testator must trust the person he has trusted. Is the purchaser to seek out the legatee in any part of the world? If the bankers had refused the transfer, he might have sold the stock, and brought them the money; saying he should draw for it. Is this Court to decide upon such distinctions; and could such a system of jurisdiction be endured in a commercial country? The case must stand upon fraud.

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Mr. Cox, *in Reply*.—The proposition, upon which this case rests, is, that, where the executor pledges the property for a debt of his own, that is *primâ facie* evidence of collusion. The meaning of fraud in these cases is, where the party dealing with the executor, not in the usual course of administration, does not make particular inquiries, whether he has a right to deal in that particular manner. *Farr* v. *Newman* contradicts the assertion, that the property of the executor is absolute. It is so only for the purpose of the distribution of the assets. For that purpose certainly his power is very large; but still confined to that. No laches can be imputed to the plaintiffs. It is said, a bill might have been filed to secure these legacies: but is that to be expected from a legatee of 200*l.*: the assets also standing all this time in the name of the testator; and no attempt to dispose of them? The other plaintiff was an infant; and his legacy was not payable till the death of *Mrs. Smith*. As to the consideration, none was paid for the purposes of the estate; and clearly the antecedent debt was part. The subsequent advances were upon bills drawn antecedently: the offer to transfer being the day of the testatrix's interment. It is impossible, that the money so advanced could be for the purpose of being applied in the administration. The inference is, that there was no consideration for the purposes of the estate. The circumstance of dealing by way of mortgage is enough to raise suspicion. No danger to the public can flow from this precedent. As far as the executor deals so, that it can by possibility be taken as a fair, direct, course of administration, let it stand. The objection is confined to transactions that cannot be a fair, direct, administration. The circumstances of suspicion throw the proof on the

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(*b*) 4 *Term Rep.* 625, *note*.

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defendants. The answer to the objection of difficulty is, that they ought to have desired to see discharges from the legatees, before the transfer. It was natural to file the bill, when they heard of the insolvency, not, while they had a chance of being paid. It is decisive, that this could not be in the direct administration of the assets.

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The Master of the Rolls.—The question is whether the plaintiffs, legatees, can follow the assets in the hands of third persons, to whom the executor has transferred them. There is no evidence in the cause, but the answer. I cannot therefore infer any thing against the defendants, which they do not admit; for it was in the power of the plaintiffs to procure an explicit admission or denial of every fact, within the knowledge of the defendants. I cannot assume, that they ever saw *Mrs. Smith's* will; though *Simpson* says, he was to produce it to them; for they do not say, they ever did see it. Without doubt the plaintiffs are entitled to a decree against the executor, now a bankrupt; and his assignees are parties.

[166] Several well known cases were referred to on both sides. The defendants rely upon *Nugent* v. *Gifford*, *Mead* v. *Lord Orrery*, and *Whale* v. *Booth*, as establishing the absolute right of the executor to bind the assets by any disposition; at least, where there is no actual fraud in the party taking under it. The other cases *Humble* v. *Bill*, *Crane* v. *Drake*, *Farr* v. *Newman*, *Bonny* v. *Ridgard*, and *Andrew* v. *Wrigley*, are relied on by the plaintiffs; as showing, that there are limits to that rule; which limits they contend are here transgressed. Though it is difficult to reconcile all the doctrine and *dicta*, that are to be found in the cases, the decisions do not appear to me to be inconsistent. It is true, that executors are in Equity mere trustees for the performance of the will: yet in many respects and for many purposes third persons are entitled to consider them absolute owners. The mere circumstance, that they are executors, will not vitiate any transaction with them; for the power of disposition is generally incident; being frequently necessary; and a stranger shall not be put to examine, whether in the particular instance that power has been discreetly exercised. But from the proposition, that a third person is not bound to look to the trust in every respect and for every purpose, does it follow, that, dealing with the executor for the assets, he may equally look upon him as absolute owner, and wholly overlook his character as trustee, when he knows, the executor is applying the assets to a purpose wholly foreign to his trust? No decision necessarily leads to such a consequence.

In many respects and for many purposes third persons may consider executors absolute owners.

Power of disposition generally incident to an executor.

In *Nugent* v. *Gifford* it appears from the Register's book, as stated (*a*) in *Andrew* v. *Wrigley*, though not in the report in *Atkyns*, that the testator died two years before the executor [167] and residuary legatee made the assignment, that was impeached. At least therefore there was room to suppose, that

(*a*) 4 *Bro. C. C.* 135, 136.

the executor might in that period by advances on account of the trust have entitled himself to reimbursement out of the assets: but even so explained, the late Master of the Rolls would not go further than to say, that case might be rightly determined; and, in *Scott* v. *Tyler*, Lord *Thurlow* said,(a) it was difficult to reconcile it with *Crane* v. *Drake*. In *Mead* v. *Lord Orrery*, Lord *Hardwicke*, instead of stating shortly and generally, that an executor has the absolute right to dispose, as he pleases, of the testator's property, enters into all the circumstances, to show, that in that case the assignment ought to stand, that it was made several years after the testator's death: that it was not the case of a sole executor disposing for his own benefit, but of three executors, two not interested, one a residuary legatee; that, as he was one of the executors, and in his banking shop the money affairs were transacted, he might have been, as he was recited to be, the sole owner of the mortgage: he might be a creditor for that sum by advances made by him: or it might have been released and assigned to him by the other executors, as his share of the residuary estate. Under all those circumstances, perhaps it would have been hard to have deprived the assignee of the benefit; and yet Lord *Kenyon* in *Bonny* v. *Ridgard*, with an accurate note of which I have been favoured by *Mr. Cox*, declared his dissent from that case; and declared, he should have given the opposite decision; and yet there was nothing like express fraud, and no motive for it, in order to obtain that assignment; for *Mead* the younger was not indebted; but was only to give security for what might come to him afterwards as receiver; and he used the mortgage for that purpose. It was indifferent to them, whether they had that or any other security. [168] But Lord *Kenyon* says, that if there is either express or implied fraud, the purchaser is bound. In *Whale* v. *Booth*, though that case seems overruled by *Farr* v. *Newman*, stress was laid upon the circumstance, that the testator had been dead three years; and Lord *Mansfield* says, "if the executors "paid all demands, as in that time they might have done, the "assets belong to them."

Those three cases for the defendants are in some degree impeached in subsequent decisions. But, supposing they were not impeached, there is nothing in any of them excluding the possibility of the executor having acquired on the execution of the trust, a right to appropriate to himself the assets. But in this instance the assignment was made in less than a month after the death of *Mrs. Smith*. There is not, therefore, the least ground for the presumption of right acquired to the assets of *Mr.* or *Mrs. Smith*, by payments made in that short interval on account of either estate. It is not pretended, it was to satisfy any claim on either estate; for the express purpose appears to have been to secure a debt of his own, which he already owed to the bankers, and other advances they were to make

(a) 2 *Bro. C. C.* 477.

1802.

HILL v. SIMPSON.

by taking up bills of his, then actually outstanding. They had distinct notice therefore, that the money was not to be applied to any demand upon either estate; but the assets were to be wholly applied to the private purpose of the executor. Allowing every case to remain undisturbed, does it follow from any, that an executor in the first month after the testator's death can apply the assets in payment of his own debt; and that a creditor is perfectly safe in so receiving and applying them, provided he abstains from looking at the will, which would show the existence of unsatisfied demands? I am for the moment keeping out of sight the representation made by *Simp-* [169] *son;* and supposing the question to be, whether an executor may thus deal and be dealt with; and it is clear, no rule of justice permits, or of convenience requires, that he should have this unbounded power. Though it may be dangerous at all to restrain the power of purchasing from him, what inconvenience can there be in holding, that the assets, known to be such, should not be applied in any case for the executor's debt, unless the creditor could be first satisfied of his right? It may be essential, that the executor should have the power to sell the assets: but it is not essential, that he should have the power to pay his own creditor; and it is not just, that one man's property should be applied to the payment of another man's debt.

But the question is, not, whether the rule is now to be made more strict, but whether general justice and convenience require it to be relaxed beyond all former precedent. I should hesitate to go so far as other cases have gone: but this would go much further than any. If the second point in *Scott* v. *Tyler* had received the decision which it was generally supposed would have been given, *(a)* it would be an authority far beyond what these plaintiffs want; for in that case the executrix had disposed of the River *Lee* bonds four years after the death of the testator. The bankers swore, they knew nothing of the will; and they believed the bonds her own property, not that of the testator. If that case had been decided against the bankers, it would have furnished a stronger authority than is necessary for these plaintiffs.

Hitherto I have supposed the executor pretending no other authority than as executor; and that the other defendants relied solely upon his authority in that character. But the truth [170] is, it was not upon his legal authority as executor that they relied: but they proceeded, as they state, upon the faith of his representation; by which they were induced to believe, that the property he assigned to them was actually his own; as the testatrix had left him every thing, subject only to 20*l.* a-year, and a few small legacies. This representation is partly true, partly false. He was her residuary legatee; and it is taken

(a) It has since appeared, that, though that point ended in a compromise, Lord *Thurlow* had formed his judgment upon it against the bankers. See 2 *Dick.* 724.

for granted on all sides, that she had a right to dispose of this property: but he was subject to something more than 20*l.* a-year, and some trifling legacies, viz. the claims under her husband's will. This they would have seen, if they had looked at her will, instead of taking his representation. They would have seen, that he had no right to assign the stock, till the claims under that will were satisfied; and that some of those claims were unsatisfied. Common prudence required that they should look at the will, and not take the debtor's word as to his right under it. If they neglect that, and take the chance of his speaking the truth, they must incur the hazard of his falsehood. The rights of third persons must not be affected by their negligence. I do not impute to them direct fraud: but they acted rashly, incautiously, and without the common attention used in the ordinary course of business; the reference in the will of *Mrs. Smith* to the will of her husband making it the same as if a legatee of her own was disappointed by this. It was gross negligence not to look at the will, under which alone a title could be given to them. It was not necessary to use any exertion to obtain information, but merely not to shut their eyes against the information, which without extraordinary neglect they could not avoid receiving. No transaction with executors can be rendered unsafe by holding, that assets transferred under such circumstances may be followed.

1802. HILL v. SIMPSON.

For the defendants it is objected, that the plaintiffs were guilty of laches in not taking steps to secure their legacies in the life of *Mrs. Smith*. But one was an infant when the bill was filed, and his legacy was not payable till her death; and though the plaintiff *Hill* might have filed a bill, it was not gross negligence not to do so for so small an object. There was no reason to think the fund was in danger; and upon inquiry she would have found stock sufficient left to answer her legacy. Upon the whole I am of opinion, these funds are liable to answer the plaintiffs' demands. (a) [171]

(a) *Hawkins* v. *Taylor*. *Post*, {vol. viii. p. 209.}

SHAFTOE *v.* SHAFTOE. (1)

May 8. 24.

Writ of Ne exeat regno issues in the case of alimony; but only for sums actually due and costs.

MR. LEACH, for the Plaintiff, moved for a writ of *Ne exeat regno*.

By the affidavit of the plaintiff, in support of the motion, it appeared, that the plaintiff was suing the defendant, her husband, in the Ecclesiastical court for a divorce; and had obtained a sentence upon appeal to the delegates, assigning a proctor for the defendant to appear absolutely, with costs; which were taxed at 276*l.* 11*s.* 1*d.*; and a monition was served

{(1) See as to this, and the next case, the note to *De Carriere* v. *De Calonne*, *ante*, vol. iv. 577.}

1802. SHAFTOE v. SHAFTOE.

upon him for the costs. She was proceeding in the suit; but had not yet obtained alimony. The affidavit further stated, that deponent hath been informed, and believes, that, to defeat her in such suit, the defendant threatens and intends that, as soon as he shall be excommunicated, which will be the next proceeding, he will make over his property to his son, and quit the kingdom; and has declared, the plaintiff shall never have any thing he can deprive her of.

Mr. Leach, *in support of the Motion.*—This is not within the ordinary jurisdiction, upon equitable rights: but the case of [172] a suit for this purpose, alimony, is the only exception. In *Read* v. *Read*, *(a)* it does not appear, upon what ground the motion was refused: but it is to be collected from the argument, that the jurisdiction was properly to be exercised: or the wife would be without redress. In *Sir Jerome Smithson's case*, *(b)* the writ was granted. In another case, *(c)* this is stated to be the only exception. In *Roebuck* v. *Roebuck*, *(d)* a wife had obtained a sentence in a cause for adultery, establishing her innocence. Alimony was decreed to her in 1785. Afterwards she appealed; not conceiving the alimony sufficient. Pending that appeal she filed a bill for a writ of *Ne exeat regno:* her husband threatening to leave the kingdom, to avoid paying the alimony already decreed and the increase; and the writ was marked for 600*l.* The only difference of that case is, that a certain sum was ascertained for alimony. That case does not appear to have been noticed in *Coglar* v. *Coglar*; *(e)* where Lord *Thurlow* was struck with the difficulty for what sum the writ should be marked.

Lord CHANCELLOR.—In the ordinary case the Court never marks the writ for more than is due. Certainly the case of alimony is stated as a case of exception: but it is wrong, that, before that decree is made, this Court is to take it for granted, that there will be a decree for alimony and separation, and to shut up the husband pending that suit for any sum it shall name, lest there should be such a decree. Suppose the plaintiff should miscarry in her suit, after this writ has issued: what recompense can be made to him? If the suit has effect, the difficulty is, for what sum to mark the writ. The ground, [173] that the plaintiff would be without remedy, will not do; for that would apply to a judgment at law, where the man cannot be taken in execution.

The motion stood over; and in the interval the *Lord* CHANCELLOR was informed that the plaintiff had obtained a sentence in the Ecclesiastical Court for a gross sum.

May 24. The *Lord* CHANCELLOR said, upon consideration of the cases, the plaintiff might take the writ of *Ne exeat regno* for

(a) 1 *Ch. Cas.* 115. (b) 2 *Vent.* 345. (c) *Anon.* 2 *Atk.* 210.
(d) This case was cited from the Register's Book, B. 87, *October* 14, 1787.
(e) *Ante*, vol. i. 94.

the sums actually due; viz. 776*l.* 11*s.* 1*d.* His Lordship added, that he was more influenced by authority than principle. *(a)*

1802. SHAFTOE *v.* SHAFTOE.

(a) See the next case.

DAWSON *v.* DAWSON.

1803. *March* 9.

Writ of *Ne exeat regno* issues in the case of alimony; but only for sums actually due; viz. arrears and costs.

MR. COOKE moved for a writ of *Ne exeat regno* against the defendant; against whom the plaintiff had obtained a decree in the Ecclesiastical Court for alimony.

Lord CHANCELLOR.—The writ in all these cases must be marked for the sum due. There is not any instance, and obviously there cannot be any, in which the writ has been marked for the value of the annuity given for alimony. If the plaintiff was assignee of a bond that would be due on the 1st of *July*, he could not have the writ on the 30th of *June;* for the money must be due. It was a strong thing to apply this writ to alimony: but it has been done. This writ however never has [174] been granted in this Court, except where the debt was due, and, if it was at law, bail could be had. *(a)* I recollect an instance of a bond due the 1st of *January;* and the creditor gave time to the 1st of *July.* He applied in the last week in *June* for the writ; and Lord *Thurlow* refused it. In a late instance, *(b)* search was made; and no case could be found authorizing me to mark the writ for more than the sums actually due.

Analogy between the writ of *Ne exeat regno* and bail.

The sum of 48*l.* being due for arrears, and 88*l.* for costs, the writ was marked for those sums. *(c)*

(a) See *Russel* v. *Asby, ante,* vol. v. 96.
(b) *Shaftoe* v. *Shaftoe,* the preceding case.
(c) See *Cock* v. *Ravie, ante,* vol. vi. 283.

MOODY *v.* MATTHEWS.

1801. *July* 8. *December* 2. 1802. *May* 25.

BY indentures, dated the 1st of *January*, 1774, *Mary Price* in consideration of 300*l.* sold to *John Moody* and his assigns, for his natural life, an annuity of 25*l.* out of and from all the tithes, arising, renewing, &c. within the several townships, hamlets, fields, &c. in the Parish of *Llanfain Talliayarne*, in the County of *Denbigh*, with all the glebe lands, oblations, &c. rents and profits, whatsoever, due to the Dean of *St. Asaph* within the said townships, &c. payable quarterly; with power of entry on default of payment for forty days; and *Mary Price* covenanted to pay the annuity; and that the said

Grant of an annuity for life out of tithes leased for years, with covenant for further assurance. The lessee afterwards renewed the lease; married, and died. Her husband administered; and renewed with his own money. The annuity is a charge upon the renewed term, generally; and the grantee is not bound to contribute to the expense of renewal.

1802. Moody v. Matthews. tithes and premises should be, remain and continue, subject to the payment of the said annuity for and during * the life of *Moody*. She also executed a bond and warrant of attorney; and a memorial was duly registered.

[* 175] The tithes, out of which this annuity was made payable, were held by *Mary Price* under a lease granted by the Dean of *St. Asaph*, dated the 10th of *January*, 1771, for twenty-one years. After the sale of the annuity she surrendered the lease; and procured a new lease of the tithes, dated the 10th of *January*, 1778, for the further term of seven years; which by assignment, dated the 23d of *February*, 1778, she made a security by way of mortgage for 300*l*. borrowed from *Thomas Ruddock*. In *November*, 1779, she married *John Matthews*; and on the 7th of *November*, 1780, she died. Her husband took out letters of administration; and in *June*, 1781, he paid off *Ruddock's* mortgage. *Matthews* continued to pay the plaintiff's annuity till the 25th of *June*, 1798; having surrendered; and taken a new lease in his own name for the further term of seven years, dated the 10th of *January*, 1785; and having renewed afterwards in 1792 and 1799, for seven years each time, paying a fine.

The bill was filed against *Matthews*; praying an account of the personal estate of his wife, and of the arrears of the annuity; that the plaintiff may be put in possession of the tithes; or that a receiver may be appointed; and that the plaintiff may be declared entitled to have the lease renewed from time to time out of the estate of *Mary Matthews*, for the better securing the annuity.

The defendant by his answer stated, that at the time of his marriage he did not know of the existence of the annuity. He tendered the arrears to the 10th of *January*, 1799; when the interest of his late wife under her renewal would have expired; and as to the remaining interest in the lease insisted, [176] that he was beneficially entitled; having renewed with his own money.

Mr. Richards, and Mr. Heald, for the Plaintiff, compared this to the case of a mortgagee; who might renew; and add the expense to his principal and interest. They cited *Luckin* v. *Rushman*; (a) and *Kempton* v. *Packman*: (b) a widow entitled to a leasehold estate, renewable for lives, renewed at her own cost. After her death the question arose between her representative, and the representative of her son, entitled to the reversion; and it was decreed, that on payment of all the costs of the renewal by the representative of the son to the representative of the mother, the representative of the son was entitled to hold the renewed lease. They contended, that this holds in all cases, where the representative takes upon himself to renew.

Mr. Romilly, and Mr. Thomson, for the Defendant, insisted, that all the cases alluded to, are clear cases of *Cestuy que trust*

(a) *Finch*, 392. (b) At the Rolls, 1790.

coming against a trustee who had enlarged the term; upon which there can be no doubt; but this is a most unnatural construction of a covenant for further assurance; that at least the plaintiff must pay all the fines paid by the defendant, with interest to be computed upon all those fines; also what he has paid in respect of the mortgage, both principal and interest.

1802. MOODY v. MATTHEWS.

The Master of the Rolls.—Upon the principal question I have no difficulty in giving the decree. This is a grant of an annuity out of tithes. The grantor professes to make it for the life of the grantee. It is very clear, therefore, that as long as she has any interest in these tithes, if only for five years, the plaintiff is entitled during his life to a security upon that [177] interest. It might have been a question upon the covenant for further assurance, whether she could have been compelled to renew: but having renewed, the annuity is a charge upon the tithes. Upon her death her husband took the tithes, not as administrator, but by survivorship: but still he took them in right of his wife. In that right he has the opportunity of renewing. He has all her rights and interest; but with distinct notice of the charge. It is just the same as if it was renewed by her; he acquiring all his right through her; and taking that interest from her, with notice of the charge, he is equitably affected. So far I am with the plaintiff; for it is impossible by her act, putting in new names, to change the right of the annuitant. The defendant had no idea of that; yet the annuitant had ceased to have a right in that lease; for that was gone. The equity goes much further than as it is shaped by the defendant; for, if he cannot rid himself of the charge during the life of the wife, it will remain.

The next consideration arises upon his acting, not as administrator, but as proprietor; for such he is; having made the renewal with his own money; and I have a good deal of doubt, how that equity stands. If he had permitted the lease to expire in 1799, that would have been an injury to the annuitant. As to the grantor, she was absolutely bound to pay the annuity. Whenever therefore she renewed, she could not demand from the creditor any compensation for the expense of keeping on foot the security. But here a person renews, who was not bound to pay the annuity: who has no connexion with the annuitant; and is only bound to pay the annuity as administrator of his wife, as far as she had assets. There is no other obligation upon him. It is deserving consideration, whether that does not make a difference in the obligation; and though it is true *Mrs. Price* would have been under that obligation, whether in the case of a mere stranger, who, when [178] the renewal is made, must give the party the benefit of it, that must be without any contribution. If any thing, it must be, not the whole, but a proportion only of the benefit derived from the renewal; that is, as 25*l.* is to the whole. I wish you therefore to consider that on both sides; whether you can

1802. find any thing to resolve that doubt, which at present occurs to me.



MOODY v. MATTHEWS. 1801. Dec. 2.

The cause was again spoken to.

Mr. Richards, and Mr. Heald, for the Plaintiff.—This Equity attached down to 1799; and then the defendant taking a renewal, it remains. This interest, though not strictly a tenant-right, is like it; and has a value in this Court. It is assets. The defendant must therefore take the lease subject to the equity which belonged to it in the hands of his wife; in whose right he takes it. It cannot be compared to the case of a stranger, coming in at the end of the lease, or by a concurrent lease, without privity. If this doubt prevails, it will be impossible to make mortgages, and raise portions, upon this sort of property. Suppose a mortgage of such an interest, and then a sale: the vendee is a stranger, more than this husband: but if at the end of the lease he renews, he cannot possibly take it discharged from the mortgage. It will be said, he takes it, knowing of the mortgage. This defendant knew of this beyond all question; having paid it so long. He cannot be put in a better situation than a purchaser of the term. In the case of a term, charged with portions, would the Court permit the eldest son to suffer the term to run out? Suppose, he takes a renewal: would the Court say, the charge is good to the end of the term in the life of the tenant for life, but [179] not as against the tenant in tail, having the absolute interest? This annuity is beyond all question an encumbrance; and the property is bound by it as much as by a mortgage. Why should there be an end of the encumbrance, because the term would have ceased if not renewed? At all events the husband cannot take the property in a better condition than the wife; and if the encumbrancer had called for a renewal, she could not have resisted it. The Court must have interfered, to prevent her from letting it run out; making the contract totally fruitless.

No case is to be found like this. Those, which are to be met with, are, where a person having a partial interest, an executor or mortgagee, shall not be permitted to renew, and take the benefit to himself. The distinction of those cases is, that the mortgagee, &c. has a partial interest in it; and as to the remainder is trustee for the old lessee or the creditors. *Holt* v. *Holt (a)* and *Raw* v. *Chichester (b)* establish, that, where there is a tenant-right, the Court will not permit the representative to renew for his own benefit. This defendant had not any interest previously to his marriage. With respect to the objection, that the wife died without assets to renew, notwithstanding that circumstance, this purchaser for valuable consideration is entitled to the relief; which cannot depend upon the circumstance, whether there are assets, or not. The only dif-

(a) 1 Ch. Cas. 190. (b) 1 Bro. C. C. 198, note.

ference is, that in the one case there must have been a contribution, in the other not. *Maxwell* v. *Ashe*. (c) 1802.

Mr. Romilly, and Mr. Thomson, for the Defendant.—There are two questions; 1st, whether the defendant ought to be compelled to pay the annuity after the 10th * of *January*, 1799: 2dly, which was the point, on which the Court felt a difficulty, whether, if the annuity is to be paid, there ought not to be a contribution. This defendant in respect of this lease stands as a purchaser; and the case of executors and trustees is wholly inapplicable. They cannot deal with the property for their own benefit; but must take as trustees. Persons having a limited interest are not to avail themselves of the situation in which they are placed by the testator, having a tenant-right, to procure a much larger interest than the testator intended, at the expense of those to whom he intended that larger interest. The grant of the annuity is out of the tithes merely: not mentioning the lease. The point of notice is, whether he had notice when he became the purchaser; not depending upon payment to this time in his own wrong. He stands, not only upon his marital right, but also as standing in the place of the mortgagee, paid off by him. He takes the lease in his own right as husband; and the Court cannot compel him to renew, because in another character, as administrator, he takes assets. The only cases to be found are those of tenant for life and remainder-man; the principle of which is now well understood. (a) The difficulty in those cases was, to ascertain the proportion of the fine before the interest was known; which was generally by a reference to the Master. There has been no difficulty where it has been exactly known what interest the parties took in the lease; as where the tenant for life renewed; and himself out-lived the term; having had the whole benefit he must pay the whole fine. So, where the tenant for life dying before the commencement of the renewed term, the remainder-man has the whole benefit, the latter must pay the whole fine. If during the term granted in 1778 the plaintiff had been called upon to pay any part of the expense of renewal, he would probably have refused; saying, it would be for the benefit of the remainder-man, not of himself. But in the event that has happened, it is clear, that if all these renewals had not been made, the plaintiff could have had no benefit whatsoever. The justice of the case then is, if the plaintiff desires to have the benefit, that out of the profits the fines and interest upon them should be paid; as in the case of a mortgage; for till then there is no clear fund. When that is discharged, the plaintiff will be entitled to the arrears of his annuity. The first encumbrance upon the renewed lease, commencing on the expiration of the old term, is the fines and interest; the next the arrears of the annuity; and then the defendant is entitled to the interest in the renewed lease for his own benefit. That is the only decree to which the plaintiff is entitled. It may probably be

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(c) 1 *Bro. C. C.* 444, note. (a) *White* v. *White*, *ante*, vol. iv. 24.

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necessary to renew again, before the encumbrances are discharged; and in that case provision must be made for that before the annuity. The defendant insists, that by his marriage, and the death of his wife, he became entitled to this leasehold interest for his own benefit, subject to the charge created by the wife prior to the marriage, so far as the extent of her interest would make him subject to it; which cannot be carried further after her death than to charge her estate in the hands of her representative. Beyond that he acquired this interest in the estate for his own benefit. The annuitant might have compelled *Mrs. Matthews* to renew, or, it may be admitted, her representative to the extent of the assets; but has not a right beyond that to call upon the husband.

Mr. Richards, in Reply.—What he takes in right of his wife he takes in a manner as purchaser, but subject to the encumbrances; though he had no notice at the time of his [182] marriage. The Court would not have compelled the executor to renew, if he had not assets; but would have put the encumbrancer in a condition to renew, if he chose; and to add the expense to his encumbrance. Since *White* v. *White* (a) the rule is, that the tenant for life pays only the interest. This is an encumbrance anterior to all the estates. There can be no distinction between this encumbrance and a mortgage. The dry question is, whether the husband takes the property in a different condition from that in which it stood in his wife. Though this is not to be considered as the case of executor or administrator, those cases show the principle, that a person taking in right of and through another shall take subject to the encumbrances. The instance of a person having a partial interest also applies strongly. Shall this defendant, having taken a partial interest in right of his wife, enlarge that interest without making the property equally liable to the encumbrances? Bearing the two characters of administrator to his wife, and surviving husband, in which character he renewed does not appear. The tenant-right makes a strong part of the case. It is not strictly a right, but a fair expectation of value; and on which a price is always set; a preference given by the lessor. If the lessee had disposed of the lease by will, or conveyed it voluntarily, the person to whom it was bequeathed, or the assignee, would have been bound by the equity. Can the right of survivorship amount to more? If liable during the coverture, he was liable afterwards, taking by act of law. There can be no arrangement of contribution here. The defendant, thinking it worth his while to renew, takes it subject to all the equity with which it was cloathed in the hands of his wife. As to the mortgage paid off by the defendant, this annuity is an encumbrance prior to that mortgage.

[183] *The Master of the Rolls.*—The result of my examination of this case is, to entertain more doubt than I had even upon the first question. The lease having been in fact renewed, I

(a) *Ante*, vol. iv. 24.

thought, upon some terms it must be liable to the plaintiff; and that the difficulty would be how to arrange the terms. Upon the result of the case I have been brought a good deal to doubt, as to the right of the plaintiff at all; for all the cases are cases of representatives, persons having no right but from that capacity, or their situation, as having limited interests. There may be very considerable distinctions between that case and this. The husband may forfeit or dispose of the interest during her life. If he does neither, it survives to the wife. If he survives, it goes absolutely to him. The question is, how he takes it and whether subject to all the equities. There are many obligations which do not survive against the husband after the coverture. There is no case resembling this; or, from which any principle can be deduced, having a strict analogy; and I am not at all aided by the case of representatives.

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Husband may forfeit or dispose of his wife's chattel real during her life: if he does not, it survives to her: if he survives, it goes absolutely to him (1)

Many obligations, which do not survive against the husband after coverture.

† *The Master of the Rolls*, having stated the case, and observed, that the covenants entered into on the grant of this annuity were in effect a covenant for further assurance, proceeded thus:

† 1802. *May* 25.

The defendant contends, that all he was bound to was to pay the annuity during the term, the lease had to run, when he acquired it in right of his wife; insisting, that he now holds it in his own right, discharged of the annuity: or that, if liable, at least the plaintiff is bound to contribute to the expense of renewal. If she had continued unmarried, there can be no doubt, the annuity would be as much a charge upon the renewed, as upon the original lease: indeed she would have been bound to keep up the lease on account of the annuity. The plaintiff acquired an interest in the lease for his life: not in present existence a lease to last so long, but with a capacity to be extended by renewals; and the charge would always attach upon each renewed lease: the grantor being bound to keep it up for his benefit. Her husband could derive no other interest in her right than she had. The lease and right of renewal could pass to him only in the same plight and condition as she held them; and therefore subject to every equity that would attach upon her. The husband taking by marital right is not esteemed a purchaser for valuable consideration. He stands precisely in the place of his wife. That is laid down in *Fitzgerald* v. *Lord Fauconberg*, (a) by the Lord Chancellor, the Master of the Rolls, and Lord Chief Baron *Reynolds*. Notice is therefore immaterial. The husband's obligation to renew is different from that of the wife. After the dissolution of the marriage he is not bound by her personal covenants: but when the lease is renewed the equity attaches upon it; for the renewed lease is considered in equity the same lease.

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The plaintiff is not bound to contribute to the fines of renewal. That would be to make him pay the consideration

(a) *Fitzg.* 207.

{(1) See *Tucker* v. *Steevens's Ex.* 4 Desaus. Cha. Rep. 532.}

1802. twice. The case of *Maxwell* v. *Ashe*, at the Rolls, 17th *December*, 1752, in a note (*b*) to *Nightingale* v. *Lawson*, (*c*) which I have looked at in the register's book, is decisive. That case was this.

MOODY v. MATTHEWS.

Joyce James gave to the plaintiff, her niece, an annuity of 100*l.* payable half-yearly without any deduction for her life,
[185] out of tithes, held for lives of the Bishop of *London*. One life had dropped: the testatrix was herself another; and *Mrs. Ashe*, the executrix and devisee subject to the annuity, was the third. After the death of the testatrix two new lives were added. *Mrs. Ashe* at first insisted, that she was not bound to pay the annuity, unless the annuitant would contribute to the expense of adding those two lives. Afterwards however she did not insist upon that claim. *Mrs. Ashe* died. At her death there was completely an end of all the lives, that existed previously to the gift of the annuity. The children of *Mrs Ashe*, to whom she devised, refused any longer to pay the annuity; insisting, that there was an end of the lease: or at least, that they were not bound to pay, unless *Mrs. Maxwell*, the annuitant, would contribute to the expense of the former renewals. She filed her bill; insisting, she was not bound to contribute; that, on the contrary they were bound to fill up the lives, that had dropped, for her benefit. The Court declared, the annuity was a charge upon the renewed lease.

In that case, as in this, the lease in being at the time the annuity was created was wholly expired; and it was there contended by the devisees, as it is here by the husband, that they had then a right, having renewed with their own money, to consider the lease as their own, and as discharged from the annuity; which ought to continue only during the continuance of the original lives. There is no difference between the cases, except this, in favour of the present plaintiff; that he is a purchaser of this annuity for valuable consideration, and against a person, who, as I have observed, is not considered in the light of a purchaser for valuable consideration, but as a mere volunteer. In that case the question was between two volunteers; and it was held there, that the annuity was not extinct
[186] by the extinction of the old lives; and the annuitant was not bound to contribute to the renewal.

Upon the authority of that case, and the principles I have before stated, declare, that the annuity claimed by the plaintiff is a charge upon the renewed lease of these tithes: and that the arrears must be paid, and the annuity must continue to be paid out of the profits of that lease.

(*b*) 1 *Bro. C. C.* 444. (*c*) 1 *Bro. C. C.* 440.

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CHAMBERS *v.* MINCHIN.

1801. *January* 28. 1802. *May* 26. 28.

One executor and trustee charged under the circumstances with a loss occasioned by joining in the sale of stock; the other having received all the money and absconded.(1)

LUCY RUSSELL, by her will, gave and bequeathed to *William Minchin*, and *William Green*, the "sum of 2400*l.* in the 5 *per cent.* Consolidated Bank Annuities;" in trust in the first place to pay the interest and proceeds of one moiety unto and between her cousins *Jane Snook* and *Elizabeth Clarke* in equal proportions during their joint lives; and upon the death of either of them then to pay the whole interest of the said moiety to the survivor during her life; and to pay the interest, and proceed of the other moiety "of the said sum of 2400*l.*" unto *John Chambers*, until such time as his daughters *Ann*, *Jane*, *Elizabeth*, and *Lucy Chambers*, respectively attain their ages of twenty-one years; and from and after the decease of the survivor of them, the said *Jane Snook* and *Elizabeth Clarke*, the testatrix gave and bequeathed the interest of the said other moiety in like manner unto *John Chambers*, until his said daughters shall respectively attain their ages of twenty-one; and when as each of them shall attain such age, directed, that a proportionate part of the said "moiety of 2400*l.*" shall be transferred into the name of each of them on attaining such age respectively; and upon the death of the survivor of them, the said *Jane Snook* and *Elizabeth Clarke*, (provided they shall [187] have attained such age as aforesaid,) then a proportionate part also of the other moiety to be in like manner transferred to each of them respectively on their attaining such age, as aforesaid; and in case of the death of either of the daughters of *John Chambers* before the age of twenty-one the testatrix directed, that the share of her or them so dying shall go to and be equally divided amongst the survivors on attaining their respective ages of twenty-one years, as aforesaid.

The testatrix then gave to *John Chambers* the sum of 50*l.* for mourning for himself and children and several specific and pecuniary legacies; and gave all the rest and residue of her goods, chattels, personal estate and effects, after payment of her debts, funeral and testamentary charges and expenses, to *Mary Midford*, *Ann Rothwell*, and *Jane Snook* and *Elizabeth Clarke*, and the survivors of them, in equal proportions, to be paid them separate and apart from their respective husbands. The testatrix then appointed *Minchin* and *Green* executors and trustees of her will; directing, that they should be indemnified from all costs and charges in and about the execution of the said will; and gave them the sum of 50*l.* each over and above the sum of 300*l.* before given to *Minchin*.

The testatrix died in *February*, 1797. The bill was filed on the 12th of *February*, 1798, by *John Chambers* and his infant daughters; praying, that the trusts of the will may be performed, so far as it concerns the plaintiffs in respect of the

{(1) See the note to *Hovey* v. *Blakeman*, *ante*, vol. iv. p. 595.}

1802. CHAMBERS v. MINCHIN. legacy of 2400*l.* in 5 *per cent.* Bank Annuities; that it may be declared, whether the testatrix meant, the sum of 2400*l.* in money should be laid out in the purchase of such 5 *per cent.* annuities; or, that so much money should be laid out as
[*188] would * purchase the sum of 2400*l.* stock in the 5 *per cent.* annuities; that directions may be given accordingly; and that the fund may be secured for the benefit of the infant plaintiffs.

The testatrix at the date of her will and at her decease was not entitled to any stock except 156*l.* a-year Bank Long Annuities. The executors by their answer, filed the 5th of *May*, 1798, stated the negotiation, that took place previously to the filing of the bill, with reference to the question upon the legacy to the plaintiffs. They admitted, that they had possessed of the personal estate more than sufficient for the debts and legacies: and submitted, whether the legacy to the plaintiffs is specific; and whether they have any right to any part of the personal estate; but believe, the testatrix intended to give the sum of 120*l.* a-year, part of the sum of 156*l.* a-year Bank Long Annuities, in trust for the purposes mentioned in the will; and not, that the sum of 2400*l.* should be laid out in 5 *per cent.* Bank Annuities, or that so much money should be laid out in such fund as would purchase the capital stock of 2400*l.* *Green* stated, that he prepared the will; and that from the instructions of the testatrix he understood, she intended the interest only of so much of her money as was then invested in any of the public funds bearing interest at 5 *per cent.* but for want of proper instructions he erroneously called the same 5 *per cent.* Consolidated Bank Annuities, instead of Bank Long Annuities; wherein her money was then invested; and he also understood, the testatrix did not intend, that any part of the stock should be sold for the purpose of investing the produce in any other public stock; but that so much as would pay the sum of 120*l.* a-year should remain in the names of the defendants until the respective deceases of *Jane Snook*
[189] and *Elizabeth Clarke*, and after the decease of the survivor should be transferred to the plaintiffs upon attaining twenty-one.

The defendants further stated, that they believe, that, in case a sufficient part of the personal estate shall be laid out in the purchase of 2400*l.* in the 5 *per cent.* Navy Annuities, the personal estate will be very little more than sufficient for the debts, legacies, and funeral expenses.

By the decree, made on the 7th of *June*, 1799, the accounts were directed against each of the executors; and it was declared, that the bequest of 2400*l.* expressed in the will to be 5 *per cent.* Consolidated Bank Annuities was intended to be a legacy of 2400*l.* 5 *per cent.* Bank Annuities; and, in case there should be sufficient to pay the debts, funeral expenses, and legacies, and the costs of this suit, it was ordered, that the defendants *Minchin* and *Green* should purchase out of the testatrix's estate 2400*l.* 5 *per cent.* Bank Annuities, and directions were given for transferring the fund, when purchased,

to the Accountant-General upon the trusts declared by the will. 1802.

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The Master's Report stated the accounts; upon which some debts and legacies were still unpaid; and that the defendants *Minchin* and *Green* had not purchased 2400*l.* Bank Annuities, as directed by the decree. The cause coming on for further directions, it appeared, that the Long Annuities had been sold out; and that *Minchin* had absconded insolvent; upon which an inquiry was directed, under what circumstances *Green* executed the power of attorney to *Minchin* for sale of the Long Annuities. Upon that reference the Master stated the affidavit of *Green*, who was an attorney at *Basingstoke*, and acted in the affairs of the testatrix there, not to a great extent, that [190] *Minchin*, who resided in *London*, had the sole management and conduct of all the affairs of the testatrix, transacted in *London;* that in *April*, 1799, *Minchin* sent to him a power of attorney to sell out the Long Annuities; that *Green* being fully impressed with the truth of a letter from *Minchin*, dated the 9th of *February*, 1798, and that it was necessary for him to execute the power of attorney for the purposes of the will immediately signed it; and that he had no motive whatever for signing it than for the purpose of enabling *Minchin* to carry into execution the trusts of the will.

The Master also stated, that the only part of the letter relating to the execution of the power of attorney was these words: "I am conclusively of opinion, that it will be better "for all parties to purchase into the 5 *per cents.* on the score "of policy and prudence; and, when we meet, will assign my "reasons for it."

This letter also stated, that *Minchin* had written to *Chambers*, that he should be apprized of their determination in ten days; that the 10th day expired that morning; and he, (*Minchin*,) had just received the label of a subpœna; and supposed one had reached *Green.*

The cause coming on for further directions, the question was, whether the defendant *Green* should be charged.

Mr. Piggott, and Mr. Trower, for the Plaintiffs.—Upon the facts disclosed by the report *Green* is responsible; and if he is, though the stocks were low, when this fund was sold out, the rule is perfectly settled, that it must now be replaced; and he must also answer for the dividends since *April*, 1799. The stock standing in the name of the testatrix, could not by the course of the bank be sold out without an authority from both the trustees. The motive assigned by *Green* for his conduct [191] is the letter written by *Minchin* long before, viz. in *February*, 1798: the date of the power of attorney being in *April*, 1799. Clearly therefore that letter was not acted upon. The sale took place after their answer was put in; submitting to act, as the Court should direct: a cause in Court: a dispute upon the construction of the will; in consequence of which the defendants state that they cannot act: *Green* also an attorney, who must have known what was proper to be done; that the fund

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ought to have been transferred to the Accountant-General. The letter is stated shortly in the report: but it gives notice to Green of the intention to file the bill, and that Minchin had actually received a subpœna. For what purpose was this sale? At the former hearing it was said, they were under the necessity of selling this fund; as it was a perishable fund. If that was the reason, why was it not done before?

The principle as to executors is, that both concur in the act, and the act is voluntary: *Sadler* v. *Hobbs*, (a) *Scurfield* v. *Hawes*. (b) In that case the Master of the Rolls observes, that till *Westley* v. *Clarke* (c) there is no case, where an executor joining in a receipt has not been held liable. Any attempt to shake those decisions would be extremely dangerous. In this instance the act was not only unnecessary, but wanton. It was also deliberate: the recent decisions, *Balchen* v. *Scott*, (d) *Rowth* v. *Howell*, (e) *Hovey* v. *Blakeman*, (f) and *Bacon* v. *Bacon*, (g) which will be relied on for the defendant, have not a circumstance analogous. This defendant acted under the
[192] trusts of the will; made various payments; and with the exception of the receipt of this fund acted equally with the other executor.

Mr. Richards, *Mr. Cox*, *and Mr. Thomson*, *for the Defendant Green*.—It cannot be said, that this defendant had any sinister view; and he did not receive any of the money, or interfere in this transaction. He living in the country, the other trustee living in town managed the property; and procured from him the power of attorney, for a given purpose, to change the fund. Certainly his conduct was indiscreet in a great degree. The late cases are very much in his favour. It does not appear to be an established rule, that executors joining in a receipt shall be charged; for in *Churchill* v. *Hobson* (a) a distinction is made between creditors and legatees. The late cases incline the other way very much. Lord *Alvanley* in *Hovey* v. *Blakeman* acceded to *Westley* v. *Clarke*. The principle established there, and approved by Lord *Alvanley*, is, that in no case shall a trustee or executor be charged with money, which does not actually come to his hands; if that fact can be clearly established. If that is left in doubt, the circumstance of joining in the receipt certainly makes a difference in the case of trustee and executor. In *Sadler* v. *Hobbs* it was the joint act of both: each trusting to the credit of the person, with whom the deposit was made. In *Balchen* v. *Scott* the executor received the property; and handed it over as executor; and that occasioned the loss. In *Hovey* v. *Blakeman* it was impossible to overcome the admission in the answer: but Lord *Alvanley's* mind throughout was very much in favour of an executor, who does not actually receive the money, and merely acts a formal

(a) 2 *Bro. C. C.* 114.
(b) 3 *Bro C. C.* 91.
(c) 1 *P Will.* 83. *Mr. Cox's* note. *Pre. Ch. Mr. Finch's* edit. 173. {*note.*}
(d) *Ante*, vol. ii. 678.
(e) *Ante*, vol. iii. 565.
(f) *Ante*, vol. iv. 596.
(g) *Ante*, vol. v. 331.
(a) p. 192. 1 *P. Will.* 241.

part, though unnecessary. That case may be stated as the result of all the cases: Lord *Alvanley* * having taken great pains to extract some principle from them. In *Bacon* v. *Bacon* the circumstances appeared by the affidavit of the defendant. He placed confidence in the representations of *Kirby*. It was the duty of the executor to see that the money was applied, if the doctrine, as now pressed, is right. 1802. CHAMBERS v. MINCHIN. [* 193]

Lord CHANCELLOR.—That case is very rightly decided. It is the business of the executor to pay the debts, and to find out the creditors: for they need not demand but by an action. He could not go personally about the country. If he sends a trusty person, that is all that can be expected; and there he made the best choice possible, the person trusted by the testator in his life and at his death, and for a purpose, in which he was answerable as executor. The fact in this instance is, that the fund was in the hand of the Court: no act necessary but to join in a transfer to the Accountant-General. If the purpose was to change the fund, as the Court would order it to be changed, as from Long Annuities to 3 *per cents.* (a) and the executor in the country executes a power of attorney to the executor in town for that purpose, I admit, that is justifiable; being for a purpose belonging to the administration of assets; but not to change it to Bank Stock. It is one thing for an executor upon a communication by the other to accede to a purpose directly connected with the will: and another, where it arises out of the acts of parties out of the will. In *Balchen* v. *Scott* the executor determined not to act. What could he do then but hand it over to the other?

For the Defendant.—The motive in this case was as honest as that of *Bacon*. The executor in the country does this act [194] under an impression, that a due use was to be made of it; believing, the other executor intended to change the fund; which he thought necessary; placing confidence in the person, in whom the testator placed confidence. Acting *bonâ fide*, but misconceiving the object, and never receiving a farthing, it would be too much for a Court of Conscience to charge him with the whole for an error of judgment. *Scurfield* v. *Howes* is only a revival of the old rule. The expression "unnecessarily" is used in that case in this sense; that the other executor might have done the act just as well without him. This act was not unnecessary in that sense; for this purpose it was necessary that both should join.

Mr. Piggott, in Reply.—The circumstances of the suit and the decree make this one of the strongest cases. The silence of the defendant at the hearing of the cause was most culpable. As to the necessity of the act, the question is upon the necessity of any transfer: a consideration antecedent to that of the necessity of his joining. The purpose in *Bacon* v. *Bacon* was to discharge the debts of the testator; necessary

(a) See *Howe* v. *The Earl of Dartmouth*, *ante*, 137.

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acts in the administration of the testator's affairs: so, in the other cases, where the executor has been excused, the thing itself was proper to be done: and he concurred simply to enable the other to do that. What resemblance have they to this? No case is so destitute of apology. This transaction was a gross and unjustifiable breach of duty; for a professional man cannot be supposed so ignorant as to imagine a necessity for putting this fund in the *5 per cent.* Bank Annuities, to answer this legacy, before the decree; the legatees not desiring it.

[195] *Lord* CHANCELLOR.—I shall look through the cases, not from any doubt how I ought to decide this; but being unwilling to risk any ground, that might militate against that, which is taken to be the present rule. In *Sadler* v. *Hobbs* Lord *Thurlow* took a great while to consider; and decided it, as his habit was, not upon circumstances, but upon a principle that he hoped would stand; and not only upon the principles of this Court, but of law. His lordship expressed a decided opinion against *Westley* v. *Clarke;* and not in that instance only; for he abided by *Sadler* v. *Hobbs* always afterwards both in bankruptcy and upon other occasions. I am now called on to decide between that case and the opinion expressed by Lord *Alvanley* in *Hovey* v. *Blakeman*, setting up Lord *Northington's* rule again.

May 28. *Lord* CHANCELLOR.—I am not able to satisfy myself that the opinion I have formed upon this case is wrong. With regard to this legacy these executors are made trustees. It appears from the answer, to which and the report I shall confine myself, that previously to the filing of the bill the plaintiff had been claiming, that this sum should be laid out in *5 per cent.* Navy Annuities; that the executors resisted that claim; that the residuary legatees were thought to be interested in that resistance; that it was suggested, as convenient to all, and not much expense to those interested in the residue, that the *5 per cent.* Navy Annuities should be bought; that a proposition for that purpose was about to be adopted; and while that was in agitation, the bill was filed. That fact is very material, with reference to the date of the letter, referred to in the report, three days only previous to the filing of the bill. [196] Upon the admission in the answer, charging themselves with the joint possession of assets sufficient to pay all the debts and legacies, a decree somewhat different might have been made; and it might have been argued with considerable colour, that the moment the construction was given to this bequest, both the defendants should have been forthwith ordered to pay this legacy among others; and it was upon them to show by strong and pregnant evidence, either, that it was an improvident admission, or, that some circumstances had occurred since the answer, entitling them not to be considered as having possessed sufficient for all the legacies as well as the debts. In most of the affairs of the testatrix, connected as to local

administration with this place, *Minchin* principally acted. *Green* acted in some of her affairs at *Basingstoke*, though not to a very great extent; and he very rashly and most improvidently placed an unlimited confidence in *Minchin* as to the affairs here. *Minchin* was, not only his co-trustee, but also his town-attorney and agent in this cause; and it is very clear, that, if a trustee trusts an attorney, he must abide by the effect of that confidence. There is no evidence as to the circumstances attending the transmission of the power of attorney, but the simple fact, that it was sent and returned. Whether any thing of the purpose, for which it was sent, was communicated, is not disclosed. There is no manner of evidence, upon which it can be collected, that if their judgment, as stated in their answer, was wrong, any circumstances had occurred, leading to a *bonâ fide* correction of it; or any transaction among those claiming under the will between the time of putting in the answer and the sale of the stock, upon which they could have conceived that a due administration of the trusts, as far as related to this property. Neither is there any evidence, that *Green* ever made any inquiry what use was made by *Minchin* of the power of attorney; what became of the annuities sold; and whether they were applied in any manner to the trusts of the will. I consider *Green* as attending the Court by *Minchin*, not as his co-trustee only, but as his solicitor. The decree was made without any communication to the Court that the fund had been sold: the defendants according to the effect of their answer inducing the Court to believe, that it remained in the state in which it was when the answer was put in; and contending upon the point stated in the answer as to the intention. The decree takes up the consideration, whether there would be enough for the other legacies; not however upon the effect of the answer charging them jointly with any thing; but directing an inquiry, what each had possessed; and making a declaration, negativing altogether the proposition, made, before the bill was filed, that 5 *per cent.* Navy Annuities were to be bought, and the idea, that *Green* had attributed as the intention. I cannot infer from the letter in *February*, 1798, that *Green* took the proposition contained in it to be a due execution of the purposes of the will, in opposition to his answer in *May*, representing it, not only as an undue execution of the will, but contrary to the intention, inconsistent with his duty to the tenants for life and the residuary legatees, and an extravagant claim, without a single ground for inferring, upon any rational principle, that he had altered that solid opinion, expressed upon his oath.

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It comes then to the naked case of co-executors, by an express bequest however attaching upon this property, co-trustees also; as indeed they would have been, even without such express bequest, in a certain sense; the joining of both being necessary to a transfer; and therefore, if they were mere executors, they would be to be considered with reference to the principles of trustees. I have looked into all the cases. Exe-

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General rule that executors joining in a receipt are all chargeable: in the case of trustees, only the person receiving the money. The reason of the distinction.

The Lord Chancellor disapproved the relaxation in favour of executors of that rule.

cutors were by the old law contradistinguished from trustees thus far. It * was laid down as a general rule, that, where executors joined in a receipt, both having the whole power over the fund, both were chargeable: where trustees joined, each not having the whole power, and the joining being necessary, only the person receiving the money was by the general rule chargeable. It is impossible to deny, that the rule as to executors has been pared down in some degree by some of the late authorities; and I will add, in a much greater degree by those authorities than by the precedents, to which they refer; for with regard to some of those cases, where executors were not charged for joining, it might be maintained, that if a sole executor had under the same circumstances put the money into the hands of the banker, or of a stranger, the sole executor would not have been chargeable; and then, if one executors puts the property into the hands of the other, who happens to be the banker, or in such a situation, that the act is not improvident, those authorities upon such circumstances cannot afford any fair distinction.

Lord *Northington* in *Westley* v. *Clarke* seems to entertain a doubt, whether that general rule could be fortified by precedents. I am much mistaken if there are not many. It seems a strong act to dispute the existence of the general rule, when no man can look at the Reports of Lord *Hardwicke's* time without seeing, that he considered that rule as well established as any; distinguishing between acting upon legal and moral necessity. The later cases seem to suppose it has a tendency to discourage executors from acting; therefore depriving persons of the providence arising from the readiness with which executors will take upon them the duty, if the rule is more relaxed. This case does not call on me to discuss whether that is well founded: but in my opinion it is very ill founded; for a plain, general rule, which once laid down is
[199] easily understood, and may be generally known, is much more inviting to executors than a rule referring every thing to the particular circumstances. A simpler rule never existed, than that, if the executor acts without necessity, he takes the power over the fund; and shall not say, he has not the power over it. It is a rule in favour of executors; enabling them to refuse to act, because it is not necessary; and therefore they will not involve themselves in the consequences. Take it the other way. Will executors be safe under the rule requiring the particular circumstances to be inquired into? Let them read all the determinations by Lords *Hardwicke*, *Northington*, *Thurlow*, *Kenyon*, and *Alvanley*, and say, before which of those Judges they should wish their causes to be decided; for the executor would come under this peril; that he is to decide for himself, not upon a general rule, that he understands, but upon the effect of particular circumstances; upon the effect of which no two of those Judges in the particular cases before them agree.

I intimate this; being of opinion, that it is never wise to

shake a general rule, if it can possibly be avoided. But it is not necessary to go into the doctrine upon the general case; for I consider *Green* as a trustee; and it is fit to look at him in that character. In many cases there has been a legal necessity for their concurrence. But it is not enough to say, it is legally necessary: but their purpose must be made out to be connected with the due execution of the trust. Examine this case by that rule. Can it possibly be said under the circumstances stated by the report, that *Green* did more than leave it to *Minchin* to do what he pleased with the property? He must then stand or fall by the purpose, with reference to which *Minchin* acts upon it; which is, to deprive these infants of it. Did *Green* take common precaution? Did he endeavour to learn what the purpose was? The purpose proposed in 1798 could only be effected by arrangement. It was not understood to be according to the intention. He swore in his answer, it would be contrary to the intention. No account is given, by what means he was persuaded to change the opinion he had formed; or, under what circumstances he was persuaded merely by a letter, requiring him to give absolute discretion to *Minchin*, to concur in that act, so as to think it consistent with any principle that he acted with *bonâ fides*; enabling his co-trustee to execute a purpose connected with the due execution of the trust. But taking into the account that he must be connected with *Minchin*, as attorney, as this is a civil demand, I must fix him with it.

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Upon the whole, taking the most favourable case for the protection of executors and trustees, it does not throw a shield over a person acting as improvidently as this defendant has acted; and if I cannot find such a principle, however I may lament the consequences in this case, I cannot give that protection.

END OF EASTER TERM.

THE SITTINGS AFTER

EASTER TERM,

42 GEO. III. 1802.

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ROLLS.
June 2.

The Court refused to order Court rolls, &c. to be delivered by the steward appointed by the trustees to the steward of the testamentary guardian: there being no suggestion of improper conduct or advantage from the change.

MOTT *v.* BUXTON.

A PETITION was presented on behalf of an infant, entitled under a trust to convey to an estate in tail male, praying, that all Court rolls, books, &c. relating to the manors, &c. to which the petitioner is entitled, may be delivered by the steward appointed by the trustees to the steward of the testamentary guardian. There was no suggestion of improper conduct.

The petition stood for judgment.

The Master of the Rolls.—This petition does not pray, that these Court rolls, books, &c. may be brought into Court; but in effect calls upon the court to determine, which of these persons is duly appointed. If it is true, as was contended, that the testamentary guardian has a right to appoint the steward, he might maintain an action for money had and received against the steward acting under an illegal and void appointment. The application ought rather to have been, that the trustees might appoint according to the nomination of the testamentary guardian. The legal estate is undoubtedly in the trustees; for this is a trust to convey; and whenever any act is to be done, it is a trust, and not a use executed. *(a)* The Court certainly *would interfere to prevent an undue exercise of their legal power, and if this were an appointment now to be made for the first time, it would be very fit to attend to the wishes of the testamentary guardian, or even of the *cestuy que trust* himself: but when this appointment was made, it was altogether unobjectionable; and allowed on all sides. The question is, whether it shall be set aside without proof or suggestion even of improper conduct or of any advantage from the change. Under the circumstances there is no ground for the change; even if the Court could interfere.

Where any act is to be done, as a conveyance to be made, the estate is a trust, not a use executed.

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Petition dismissed.

(a) See *Fearne's* Cont. Rem. 123, &c. 4 *Edit.*

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WYNN *v.* MORGAN. (1)

ROLLS. *June* 2.

Where the time, at which the contract was to be executed, is not material, and there is no unreasonable delay, the vendor, though not having a good title at the time the contract was to be executed, nor when the bill was filed, but being able to make a title at the hearing, is entitled to a specific performance. (2)

THIS bill was filed for the purpose of obtaining a specific performance of articles of agreement for the purchase of an estate in *Carnarvonshire* from the plaintiff. The articles were dated the 3d of *September*, 1800; and signed by the plaintiff and the defendant; and expressed, that in consideration of 2500*l.* to be paid on or before the 1st of *November* next, and of 1150*l.* to be paid on or before the 1st of *January* next to the plaintiff, his heirs, executors, or administrators, being the purchase money for the absolute purchase of the premises, the plaintiff covenanted with the defendant, his heirs, executors, administrators, and assigns, that the plaintiff or his heirs would on or before the 1st of *November* next make a good title to the Mansion House and lands; and deliver an abstract of such title on or before the 1st of *November;* and would before the 1st of *January* next by such good and sufficient conveyances and assurances as the defendant, his heirs or assigns, or his or their * counsel, should direct, cause to be well and sufficiently conveyed and assured unto and to the use of the defendant, his heirs or assigns, or to such other person or persons as he or his heirs should appoint, the Mansion House [* 203] and lands, &c.; and the defendant covenanted, that he would upon the 1st of *November* pay the sum of 2500*l.* to the plaintiff, and 1150*l.* on the sealing and execution of such conveyances and assurances, being the consideration money agreed upon between the said parties for the absolute purchase of the fee-simple and inheritance of the premises; and that the defendant, his heirs or assigns, should be entitled to the rents from the 29th of *November* next.

In the attestation it was stated, that it was first agreed, that the said purchase money should be paid in one entire sum on the 5th of *February* next, and not as before mentioned.

This purchase was not carried into effect: the defendant objecting to the title, on the ground, that the plaintiff could not convey the fee simple: his only interest being by purchase, under a decree, of the remainder of a term of 1000 years, created by the will of *Mary Pugh;* upon trust by sale or mortgage to raise money for payment of debts and other charges. After the bill was filed, the plaintiff procured an Act of Parliament in the last session, vesting the fee simple and inheritance of the estates of *Mary Pugh* deceased in trustees, and their heirs, upon trust to complete the sales of such parts as had been sold under the direction of the Court.

Mr. Richards, *and Mr. Spranger*, *for the Plaintiff*, admitted, that

{(1) Cited and confirmed, 4 Desaus. Cha. Rep. 136.}

{(2) See the general rule stated, *Brashier v. Gratz*, 6 Wheaton. 526. See, also, *Hepburn v. Auld*, 5 Cranch. 262. *Hepburn v. Dundas*, 1 Wheaton. 196. 3 Serg. & Rawle. 432.}

1802. WYNN v. MORGAN. by the late cases, (a) the time is essential; * but observed, that no objection of that sort had been raised: the objection being taken upon the title; and that objection being removed, the plaintiff, though he had not a good title at the time the contract was entered into, or was to be performed, may compel [* 204] an execution of the contract. They cited *Langford* v. *Pitt*, (a) and *Lord Stourton* v. *Meers*. (b)

Mr. Romilly, and Mr. Stanley, for the Defendant.—The Court will not carry into execution an agreement that is not reciprocal. The defendant was ready with his money: but the plaintiff had not a title when he contracted to sell. A term of 1000 years is not equal to the fee. In point of interest it is as good: but there is a variety of reasons for preferring to purchase the fee, which was clearly the intention of the defendant; who in *March* expressly said, he would have nothing to do with it. The plaintiff could not make a title without the aid of Parliament. This is not therefore like the usual objections, that a term is to be got in, &c. It was not clear, that Parliament would give that aid. The bill was filed without even suggesting, either, that the objection was not good, or, that it should be removed; and the Act of Parliament was not obtained till two months afterwards. Can the defendant then be compelled now to accept the title, consistently with the late authorities, holding the performance of contracts to greater strictness, and considering the time material? Under the circumstances the plaintiff is entitled to no favour; and it would be very hard to hold the defendant liable at any indefinite time.

Mr. Richards, in Reply, was stopped by the Court.

[205] *The Master of the Rolls.*—The defendant does not allege, that the execution at the day was at all material to him, and there is nothing to show, it was considered so by him. But his objection is of a different sort; that upon the day, on which the contract ought to have been carried into execution, no good title could be made by the plaintiff. It is unnecessary to determine generally, whether a plaintiff can at any distance of time come to this Court; and say, he is now ready to make a title; though he could not at the time the contract was entered into, and when it ought to have been carried into execution. But I am called upon to determine the converse of that, and to say, if the plaintiff cannot make a completely good title at the time the contract ought to have been carried into execution, he never can come for an execution. That would contradict the whole current of authorities; and would be in opposition to the uniform practice; for it is in the experience of us all, that it has been absolutely necessary for the party insisting upon the contract to do something to enable himself to convey a completely good title; and yet either

(a) *Spurrier* v. *Hancock*; *Harrington* v. *Wheeler*, *ante*, vol. iv. 667. 686; *Guest* v. *Homfray*, *ante*, vol. v. 818, and the references.

(a) p. 204. 2 *P. Will.* 629. (b) Stated 2 *P. Will.* 630.

the objection has never been taken, or it has never prevailed; for there is not a single instance of its having prevailed, so nakedly stated. Yet there are numerous instances, in which it might have been made; where acts were to be done. I am always supposing, that the day, on which the contract was to be carried into execution, is not material; and that the party is obliged to rest upon the objection to the title. There has been no unreasonable delay here. As soon as it was known, that the defendant meant to insist upon the objection, the plaintiff immediately set about remedying it; and he does remedy it in a short time by procuring an Act of Parliament; and in three months was able to make a good title. Therefore, deciding against the plaintiff, I should be under the necessity of saying, if any flaw existing at the time the contract [206] was to be carried into execution, can be pointed out, it cannot be enforced. That would be too strong. It is not necessary to infer from that, that at the distance of years the vendor may come, and say, he can now make a title, and ask a specific performance. Each case must depend upon its circumstances. All I say is, there are no circumstances in this case to prevent the plaintiff from having a performance.

Mr. Richards applied for costs.

The Master of the Rolls.—There was a frequent reference to know, at what time the title could be made. At the institution of this suit a good title could not be made. Therefore I do not see that I ought to give costs. Decree a specific performance, and a reference to the Master to settle the conveyance, if the parties differ. *(a)*

(a) A vendor is entitled to the opportunity of making out a better title before the Master. See *Jenkins* v. *Hiles*, *ante*, vol. vi. 646.

DOWNES *v.* THOMAS.

Feb. 17. 24. *June* 4.

Decree for execution of a trust to pay debts against the trustees: the other defendant not appearing upon process to sequestration.

THE bill was filed by creditors of the Marquis of *Donegall*, claiming the benefit of a trust, created in 1794, against the Marquis and the trustees.

By indentures of lease and release, a term of one thousand years was vested in trustees; upon trust by sale or mortgage of estates in Ireland, and by the rents, issues, and profits, until such sale or mortgage, to raise and pay the debts.

*The bill prayed, that the indentures may be established, and the trusts thereof carried into execution; and that the defendants, the trustees, may be directed by sale or mortgage [*207] to raise and pay the plaintiffs, and the other creditors, who shall come in and contribute to the expense of the suit, what shall be due to them for principal and interest, &c. The trustees by their answer submitted to act as the Court shall direct.

The defendant, the Marquis of *Donegall*, did not appear.

1802. POWELL v. ROBINS.

They determine the present case, upon the supposition, that no real estate passed to the executors. Here, I presume, the whole real estate was given to the son. The case of *Finch* v. *Hattersley* was furnished me by *Mr. Lloyd*. *Mr. Lloyd* says, that the devise in that case was held to be a charge upon the real estate. But there the wife, the executrix, was the devisee of the real estate; so that she had by that the means of paying the debts out of the real estate. Lord *Alvanley* in *Keeling* v. *Brown* puts the decision upon that. In this case the defendant, the devisee, is an infant, and therefore I cannot order the estate to be sold until he comes of age. I can only declare, that the simple contract creditors are entitled to stand in the place of the specialty creditors; with liberty to apply, when the infant comes of age, to have the estate sold to pay their debts. This proceeds upon the idea, that there is no real estate but what is specifically devised to the son.

ROLLS. *May* 24, 25. *June* 3.

WOOLLAM *v.* HEARN. (1)

Though a defendant resisting a specific performance may go into parol evidence, that by fraud the written agreement does not express the real terms, a plaintiff cannot for the purpose of obtaining a specific performance with a variation.

WILLIAM HEARN, being possessed of a house in *Ely Place*, under an agreement for a lease for seven, fourteen, or twenty-one years, from the 25th of * *December*, 1794, agreed to let the house to *Penelope Woollam* for seventeen years; and a memorandum, dated the 11th of *December*, 1798, was executed by them; stating an agreement for a lease to the plaintiff from the defendant for seventeen years, to commence at *Christmas* next, at the yearly rent of 73*l*. 10*s*.; the tenant paying all taxes except the land-tax, which *Hearn* agreed to pay: the lease to contain all usual covenants; and also covenants, that no public trade should be carried on in the premises; and that no alteration should be made in the front; that the lessee should leave the premises in tenantable repair, with other covenants relative to the situation of *Ely Place*, as being extra-parochial.

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The bill was filed by *Mrs. Woollam* against *Hearn*; stating, that the rent of 73*l*. 10*s*. was inserted by mistake, or with some unfair view: the real agreement being, that the plaintiff was to have the lease upon the same rent as the defendant paid to his lessor; and that he did not pay more than 60*l*.; and, in confidence, that a lease would be executed to her, she paid 60*l*. to the defendant at the time of executing the agreement, being the moiety of the sum, which the defendant alleged he had laid out in repairs. She also paid 33*l*. 15*s*. 6*d*. for fixtures.

The bill prayed a specific performance; and that the defendant may be decreed to execute a lease according to the agreement, at the rent of 60*l*. or such other rent as the defendant paid his lessor.

The defendant by his answer denied, that 73*l*. 10*s*. was in-

{ (1) Cited and remarked upon, 4 Johns. Cha. Rep. 148; and see *Gillespie* v. *Moon*, 2 Johns. Cha. Rep. 598, *et. seq.* }

serted by mistake, or with any unfair view; or that the agreement was, that the plaintiff should pay the same rent as the defendant paid; which he admitted to be 63*l.* He stated, that he believed he might say in the * course of the treaty, that she would have the premises upon the same terms as the defendant had; not meaning, that she was to have them at the same rent: but that she would on the whole have them upon terms of equal advantage with the defendant; considering the money he had expended upon them. He admitted the payment of 60*l.*; stating, that it was not a moiety of the money laid out by him; though at the time of payment it might have been so called. [* 213]

On the part of the plaintiff, her son stated by his depositions, that when he treated with the defendant for a lease of the house, he said, he had got a lease of it; but could not at that moment lay his hands upon it; that he did not exactly know what the rent was, but it was somewhere about 70*l.* a year; that he did not want to get any thing by her; and she should have the house upon the same terms he had it himself, which he repeated several times afterwards. The plaintiff's solicitor stated, that the defendant repeatedly said, upon being pressed to execute a lease, that the plaintiff held the house upon the same terms upon which he held: but, when the deponent proposed to him to execute an assignment of the original lease, he objected, that it was always his maxim not to part with the original lease, but to hold it in his own possession for his security.

Mr. Romilly, and *Mr. Wetherell*, *for the Plaintiff.*

To the objection, that the plaintiff cannot vary the written agreement, the answer is, that this is a case of fraud; upon which you must have recourse to parol evidence; otherwise it cannot be made out; and that takes it out of the statute: *(a)* *Shirley* v. *Stratton.* *(b)* *Young* v. *Clark.* *(a)* *Buxton* v. *Lister.* *(b)* [214]
These are cases of defendants resisting the performance on the ground of fraud; but the same principle must apply to the case of a plaintiff complaining of fraud. The rule "*Caveat* "*emptor*" does not apply in this instance. A person buying an estate has no right to ask the vendor what he gave for it. But this is very different; amounting to a warranty. Though there is no case precisely similar, the result of all, which are collected by *Mr. Fonblanque*, *(c)* is, that upon fraud, or mistake, parol evidence is admissible. There are several cases before Lord *Thurlow*, in which it is laid down, that a party may alter a term in the agreement in the case of fraud: *Lord Irnham* v. *Child:* *(d)* where it was taken as clear, that, if the clause had been omitted by fraud, a redemption would have been permitted: so in *Lord Portmore* v. *Morris*, *(e)* before Lord *Kenyon*. In *Joynes* v. *Statham*, *(f)* and *Walker* v. *Walker*, *(g)* Lord

(a) Stat. 29 *Ch.* II. *c.* 3. *(b)* 1 *Bro. C. C.* 440.
(a) p. 214. *Pre. Ch.* 538. See the references in the notes by *Mr. Finch.*
(b) 3 *Atk.* 383. *(c)* 1 *Fonb.* 122. *(d)* 1 *Bro. C. C.* 91.
(e) 2 *Bro. C. C.* 219. *(f)* 3 *Atk.* 388. *(g)* 2 *Atk.* 98.

1802.

WOOLLAM v. HEARN.

Hardwicke intimates an opinion, that the plaintiff might have done so, if the parties had been reversed. *Rich* v. *Jackson (h)* was determined upon the ground, that it was not a case of fraud. If the bill had been filed against this plaintiff, upon all the authorities she might have insisted upon this variation; for the Court would not assist a plaintiff coming to enforce an agreement, by his own fraud not according to the true contract. There can be no principle, why a man may set up a fraud defensively, which he cannot offensively. The defendant must go the length of saying, that no proof of fraud, however [215] clearly it may be made out, that the written agreement was not the actual agreement, will be adequate. Certainly a plaintiff must make out a stronger case. The consequence of refusing this relief would be, that the person who contrived the fraud, and who, if he filed a bill, would not be permitted to set it up, may secure the advantage by refusing to perform the agreement; driving the other to be the actor, and to file a bill. In many of these cases the fraud has not been clear. This is beyond a doubt misrepresentation from first to last; not only *suppressio veri*, but also *suggestio falsi*. How is it to be distinguished from a purchase of an estate, represented by the vendor at a certain number of acres, and turning out to be less? There is a similar reference here to the rent. The defendant's construction of his words is impossible.

Mr. Leach, for the Defendant.—The cases cited proceed upon a principle wide of the Statute of Frauds. The plaintiff signed this agreement under the notion, that the rent specified was paid by the plaintiff to his landlord. Assume that fact. She undertook it with full knowledge. This is not within the principle upon which the Court permits a written agreement to be varied by parol. The meaning of that rule is, that the writing must differ from the intention of the party, when signing it. This plaintiff intended, and knowing it bound herself, to pay 73*l.* 10*s.* per annum. She does not insist, that she signed the agreement by mistake: but she contends, upon the suppression of the fact, not merely, that she is to be discharged from the written agreement, which might be done, if the case was made out, but beyond that to set up another agreement, existing only in parol. That is the distinction. If she meant only to pay a rent of 63*l.* and the other by fraud inserted 73*l.* the Court would correct it: but this is an attempt [216] to repeal the Statute of Frauds. The danger of admitting such evidence must be attended to; persons supporting their own case, and affecting to state the very words that passed. By the alteration of a word the witness alters the whole conversation. But, admitting the evidence, it by no means supports their case. If the understanding was, that the plaintiff was to stand in the same relation to the original landlord as the defendant, how was it, that she was to pay 60*l.* as a considera-

(h) 4 *Bro. C. C.* 514, *ante*, vol. vi. 334, in a note to the *Marquis Townshend* v. *Stangroom*, *ante*, vol. vi. 328; where all these cases are fully discussed.

tion for the lease? He meant nothing more than what he states in his answer; that she should have it upon terms of equal advantage. The supposed fraud consists in this; that having expended money he must therefore have an increased rent.

Mr. Romilly, in Reply.—With respect to the Statute, I cannot state any case exactly like this: but, where a party by a fraudulent representation of the facts has obtained a contract, it has been decided in many instances, that a case of fraud is always an exception out of the Statute. *(a)* If the party undertakes to show, that by fraud he was induced to sign an agreement different from the actual agreement, he may read evidence to that. This extends to cases of every description: deeds executed with the most solemn forms. In *Filmer* v. *Gott (b)* evidence was admitted to prove a consideration in the deed different from that stated; a pecuniary consideration: the deed expressing natural love and affection. That was followed by *The King* v. *The Inhabitants of Scammonden*, *(c)* and various other cases. *Lord Irnham* v. *Child*, and *Portmore* v. *Morris*, *(d)* are as strong cases as can be produced: being not only to vary the written agreement, but to have a specific performance of the agreement so varied. There can be no difference, whether the party producing the evidence is plaintiff or defendant: the question being as to the rule of evidence; and a positive rule of evidence being equally applicable to both cases. In *Doe* v. *Allen*, *(a)* a very strong case, upon a will, evidence was admitted; upon this ground, that if you so rigidly adhere to the Statute, it would be not a statute for the prevention, but for the protection and furtherance, of fraud. [217]

In this case the rent of 73*l*. 10*s*. was agreed on only because the defendant said, he paid that rent to his landlord. The defendant, the only person who knew the rent, refused to produce his lease. The sum inserted in the agreement has reference to something, which is substantially the agreement. This is not, as represented, a party with knowledge consenting to pay this rent. She never agreed to pay more than he paid. Suppose a person, owner of the fee, and likewise occupier, contracts to sell the estate at so many years purchase, telling the party with whom he contracts that it is 100*l* a-year. Attending to the language of the defendant, "*terms*," can mean nothing else than the rent. The defendant's interpretation is totally impossible.

The Master of the Rolls.—The doubt I have felt during the argument of this case, whether there is any instance of executing a written agreement with a variation introduced by parol, still remains; and as it is an important question, I wish to consider it.

(a) See the references in the note, *ante*, vol. iii. 38, 39, to *Pym* v. *Blackburn*.
(b) 7 *Bro. P. C.* 70.
(c) 3 *Term Rep.* 474.
(d) 2 *Bro. C. C.* 219.
(a) p. 217. 8 *Term Rep.* 147.

1802. *The Master of the Rolls.*—This bill calls upon the Court for a specific execution of an agreement for a lease, at a rent of 60*l.* a-year. *There is no agreement in writing for a lease at that rent; the agreement expressing a rent of 73*l.* 10*s.* The plaintiff contends, however, that she signed that agreement under a belief, that such was the rent payable by the defendant: the real agreement being for a lease at the same rent he paid to his landlord. The defendant in his answer admits, he might have said, she should have it upon the same terms, not meaning the same rent, but upon terms upon the whole equally advantageous; insisting, that, as he had laid out a great deal of money, she would upon the whole have as good a bargain. She offers parol evidence to prove an express agreement, that she was to have it upon the same terms as he had it; and to show, that nothing could be meant by that expression, but the same rent: nothing being in discussion between them, but the amount of the rent. He alleges a particular reason for not stating it; that he had not his own lease at hand. The question is, whether the evidence is admissible; for, though read, it has been read without prejudice. The defendant controverts the effect of the evidence, supposing it can be received; but I own, my opinion is, that, if received, it will make out the plaintiff's case; for, taking the whole together, there is hardly a doubt, that the impression meant to be conveyed was, that the rent should be the same; and, whatever he meant, that is the impression any person would have received from his language.

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By the rule of law independent of the Statute of Frauds, parol evidence cannot be received to contradict a written agreement.

By the rule of law, independent of the Statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry, that the rule of law was adopted. Though the written instrument does not contain the terms, it must in contemplation of *law be taken to contain the agreement; as furnishing better evidence than any parol can supply.

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Thus stands the rule of law. But when equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party to be charged is let in to show, that under the circumstances the plaintiff is not entitled to have the agreement specifically performed; and there are many cases, in which parol evidence of such circumstances has been admitted; as in *Buxton* v. *Lister;* which is very like this case. There, upon the face of the instrument, a specific sum was to be given for the timber: but it was shown by parol, that the defendants were induced to give that upon the representation that it was valued by two timber merchants, which was not true. So here by the agreement, upon the face of it, she is to pay this rent: but by the evidence she was induced to do so, because she thought, from his representation, that it was the rent he paid. If this had been a bill brought by this defendant

for a specific performance, I should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance. But this evidence is offered, not for the purpose of resisting, but of obtaining a decree: first, to falsify the written agreement; and then to substitute in its place a parol agreement, to be executed by the Court. Thinking, as I do, that the statute has been already too much broken in upon by supposed equitable exceptions, I shall not go further in receiving and giving effect to parol evidence, than I am forced by precedent. There is no case, in which the Court has gone the length now desired. But two cases are produced, in which, it is said, there is an intimation from Lord *Hardwicke* to that effect. Upon that it might be sufficient to say, it was not decided. But it is evident from the manner in which that great Judge qualifies his own doubts, that he thought it impossible [220] to maintain such a proposition as the plaintiff is driven to maintain. In *Walker* v. *Walker*, it is to be observed, first, that the parol evidence was not offered for the purpose of contradicting any thing in the written agreement. It was admitted that, as far as it went, it stated the true meaning. But it was contended by the defendant, that there was another collateral agreement, which the plaintiff ought to execute, before he could have the benefit of the written agreement. It was evidence too offered in defence, to resist a decree. Lord *Hardwicke*, after stating the ground, expresses himself thus:

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"The plaintiff for these reasons is not entitled to relief in "this Court for supplying the defect of a legal conveyance: "but it is rebutted by the equity set up by the defendant. I "am not at all clear, whether, if the defendant had brought "his cross bill to have this agreement established, the Court "would not have done it, upon considering this in the light "of those cases, where one part of the agreement being per-"formed by one side, it is but common justice it be carried "into execution on the other; and the defendant would have "had the benefit of it as an agreement."

So he states the special reason; not being at all clear, that the defendant would have been so entitled. There is nothing of admitting parol evidence to contradict a written agreement, and next to set up a parol agreement, to be executed by the Court.

The other case referred to is *Joynes* v. *Statham*, referred to for the opinion expressed by Lord *Hardwicke:*

"Suppose, the defendant had been the plaintiff; and had "brought the bill for a specific performance of the agreement: [221] "I do not see but he might have been allowed the benefit of "disclosing this to the Court."

But the reason is assigned:

"Because it was an agreement executory only; and as in "leases there are always covenants relating to taxes, the Mas-"ter will inquire, what the agreement was as to taxes; and "therefore the proof offered here is not a variation; but is

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"explanatory only of what those taxes were. I am of opinion "to allow the evidence of the omission in the lease to be read."

The parol evidence was received for the purpose of resisting performance of the agreement; and received likewise, not to contradict it, but to show, that, as it stood, it did not fully express the meaning and intention of the parties; there being another stipulation agreed upon; but not introduced into the written instrument; and even if that had been a bill by the defendant to carry into execution the agreement, he would not have found it necessary to offer parol evidence to contradict any thing in it; for he allowed it to contain the intention as far as it went: but the provision, that the rent was to be clear of taxes, was omitted; and Lord *Hardwicke* from the particular nature of that stipulation expresses a doubt, whether if the defendant had been plaintiff, he might not have been permitted to give evidence: it being usual to leave that open; intimating, that it would be merely explanatory as to the taxes.

But this is evidence to vary an agreement in a material part; and, having varied it, to procure it to be executed in another form. There is nothing to show that ought to be done; and my opinion being that it ought not, I must dismiss the bill, but without costs.

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[222] The plaintiff then applied for a decree according to the written agreement; with a covenant for quiet enjoyment; as he had not power to grant such a lease.

The Master of the Rolls said, the bill was not for that purpose; expressly objecting to a lease at the rent of 73*l.* 10*s.*

The bill was dismissed without costs, and without prejudice to another bill for a lease, at the rent of 73*l.* 10*s.*

June 18.

ANONYMOUS.

Order to amend, not served or drawn up, does not prevent a motion to dismiss the bill for want of prosecution.

THE bill was filed to set aside an award.

Mr. Bell, for the Defendant, moved to dismiss the bill for want of prosecution; stating, that a motion to amend had been made; but no order was served, or drawn up; and that if this is sufficient, no bill could be dismissed for want of prosecution; for an order to amend would constantly be obtained.

The Lord CHANCELLOR concurred in that observation; and added, that an order not being served or drawn up goes for nothing.

The order to dismiss the bill was made.

1802.

ROLLS. June 21.

ANDREW v. THE MASTER AND WARDENS OF THE MERCHANT TAYLORS' COMPANY.

See *The Attorney-General* v. *Andrew*, *ante*, vol. iii. 633.

A compromise, applying part of the fund to an establishment at *St. John's College, Oxford*, with which the *Merchant Taylors' Company* are connected, and giving the rest to the next of kin, was, the Attorney-General consenting, established by decree.

THE decree in the cause of *The Attorney-General* v. *Andrew*, (a) was affirmed on appeal by the House of Lords on the 20th of *February*, 1800.

By that decree the information as against *Trinity Hall* was dismissed; and it was ordered, that the relators should be at liberty to lay proposals before the Master for carrying into execution the intended donation of the testator within the intent and meaning of the will.

The account having been taken, and the funds transferred to the Accountant-General, and the costs paid, no further proceeding was had under that decree. Afterwards the *Master* and *Wardens* of the *Company of Merchant Taylors* agreed to compromise the suit with *Thomas Harrison Andrew*, the residuary legatee and one of the executors of *James Andrew;* who was the executor and residuary legatee of *Lois Andrew*, the surviving next of kin and residuary legatee and sole executrix of the testator; upon the terms, that a part of the funds should be appropriated to the establishment and maintenance of certain scholarships or exhibitions for the study of the civil law in the College of *St. John the Baptist*, in the *University of Oxford;* which college is connected by the terms of its foundation with the *Company of Merchant Taylors;* they having a right of sending scholars from their school to that college; who on admission become scholars, and succeed to fellowships of that college; and the college acceding to that arrangement, articles were executed, dated the 6th of *February*, 1801; by which it was agreed, that 2610*l.* cash, with interest at 5 *per cent.* and 2666*l.* 13*s.* 4*d.* 3 *per cent.* Consolidated Bank Annuities, part of the funds, should be appropriated for the purpose [224] of establishing six scholarships in *St. John's College*, according to the agreement; and that *Thomas Harrison Andrew* should have all the rest of the funds.

The bill was filed by *Thomas Harrison Andrew* against the *Merchant Taylors' Company*, *St. John's College*, the Attorney-General, the co-executor with the plaintiff of *James Andrew*, and the heir at law, to have the articles carried into execution.

This cause was ordered to stand over till the decision upon the petition of rehearing of *Moggridge* v. *Thackwell.* (a)

Mr. Alexander appeared for the Attorney-General, and consented on his part to the decree prayed.

The Master of the Rolls expressed a doubt, whether this could be done consistently with the decree that has been made; whether this arrangement, carrying it from *Cambridge* to *Oxford*, is an execution *Cy pres.*

(a) *Ante*, vol. iii. 633.

(a) p. 224. *Ante*, 36.

1802. ANDREW v. MERCHANT TAYLORS' COMPANY.

Mr. Romilly, for the Plaintiff, said, the *Merchant Taylors' Company* were desirous of waiving any proposal beyond this, compromise, which carries into execution the intention as far as can be done: as this College is connected with the school; and no other College will accept it with this condition annexed.

[225] *Mr. Richards*, (*amicus curiæ*,) observed, that in the case of *Wheatley Church*, (*b*) Lord *Kenyon* was of opinion, they were competent to agree among themselves as to what should be applied.

The Master of the Rolls.—There is an appropriation in this case as much as in that. I wish the Attorney-General's consent to appear. Then let the decree be made according to the prayer of the bill.

(*b*) *The Attorney-General* v. *The Bishop of Oxford.* Stated from the Register's Book, *ante*, vol. iv. 431, in *Corbyn* v. *French.*

URQUHART v. KING.

ROLLS. *June* 21.

Executors, though not having legacies, held trustees of the residue for the next of kin. (1)

JANE MORRIS made her will in the following manner: "I *Jane Morris*" of *Berrymead Lodge*, &c. "intending to "dispose of part of my personal estate do make my last will "and testament respecting the same in manner following."

The testatrix then gave legacies to several relations of her deceased husband, residing in the *American States*, and in the event of the death of any of the legatees in her life, to their respective issue; and then proceed thus:

"And I direct the said several legacies to be paid to the "several persons aforesaid in lawful money of Great Britain, "at the expiration of six months next after my decease, and to "be remitted them in full without any deduction then for any "tax or duty, that may be payable in respect of the same lega-"cies to government, or any duty or expense, that may be "payable or may attend the remittance thereof or the giving "any release or acquittance to my executors for the same; and

[226] "to that intent I give to my executors hereinafter named such "a sum of money as may be necessary to pay and satisfy every "tax, duty, and imposition, payable in respect of the same "several legacies and the expense of taking and procuring "proper releases and acquittances, and also all costs and "charges, which they may incur, or be put unto in the execu-"tion of this my will; and I constitute and appoint the "Honourable *Rufus King*, Minister Plenipotentiary from the "*United States of North America* aforesaid, or such other per-"son, who at the time of my death shall be Minister Plenipo-

{(1) See the notes to *Bennet* v. *Batchelor*, *ante*, vol. i. p. 63, and *Clennell* v. *Lewthwaite*, *ante*, vol. ii. p. 465.}

"tentiary from the *States of America* to this Kingdom, and "*Francis Gregor*, of *Trewarthenick*, in the county of *Cornwall*, "Esq. executors of this my will." 1802.

URQUHART v. KING.

By a codicil she gave other legacies specific and pecuniary; but made no disposition of the residue.

Upon the bill of the surviving brothers and sisters of the testatrix, and nephews and nieces, the children of a deceased brother, claiming the residue as next of kin, the only question was, whether the executors were trustees of the residue for the plaintiffs: the executors claiming it beneficially.

Mr. Romilly, for the Plaintiffs; Mr. Lloyd, and Mr. Dowdeswell, for other next of kin.

Upon this question, which is a mere question of evidence, the circumstance of a legacy to the executor, (*a*) is only one circumstance, and a very slight one. It is impossible to say, the first case upon that is very satisfactory. Upon many other circumstances the Court has considered the executor a trustee; as, where the testator has declared, he meant to give to another: (*a*) *Androven* v. *Poilblanc*: (*b*) so, where he left a blank; (*c*) showing, he did not intend to give it to the executor as executor. That also has been thought material to show, the testator did not intend to die intestate as to any part of his property. In general, a testator does not intend to die intestate as to any part. The object of this will is very material; showing, the testatrix did not intend to dispose of the residue. The choice of *Mr. King*, or the Minister Plenipotentiary from the *American States*, for the time being, as one of her executors, shows she meant him by virtue of his office only: many of the legatees also being resident in *America*: *De Mazar* v. *Pybus*. (*d*) The direction, as to the costs and charges of the executors, was quite unnecessary, if she meant them to take all the residue beneficially. *Dean* v. *Dalton*. (*e*) [227]

Mr. Richards, and Mr. Steele, for the Executors.—The executors are in point of law entitled. A testator cannot die intestate, as long as there is an executor. This case is perfectly new in its circumstances; not like a bequest to a person, who dies in the life of the testator. In that case, it is clear, the testator intended to give it from the executor. So in the case of the blank the conclusion is, that he intended to give the residue to some one, not the executor; for his name the testator knew: but the other did not occur to him. Where the residue is given to the executor "in trust," that is an express declaration, excluding him. *Dean* v. *Dalton* is equivalent; the executors having legacies for their trouble. In *De Mazar* v. *Pybus* the appointment was of the partnership, not individually; and they were also made guardians; and that [228]

(*a*) See *Nisbett* v. *Murray*, *ante*, vol. v. 149, and the references in the note, 158; *Abbott* v. *Abbott*, *ante*, vol. vi. 343.

(*a*) p. 227. *Bennet* v. *Batchelor*, *ante*, vol. i. 63. *Mordaunt* v. *Hussey*, *ante*, vol. iv. 117. (*b*) 3 *Atk*. 299.

(*c*) *The Bishop of Cloyne* v. *Young*, 2 *Ves*. 91.

(*d*) *Ante*, vol. iv. 644. (*e*) 2 *Bro. C. C.* 634.

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very term makes them trustees. The direction for paying the Stamp duty is merely increasing the legacy. As to the direction giving the executors their costs, nothing is given to them for their trouble in executing the will. It is not necessary to show bounty intended to the executors. The plaintiffs must show the contrary. The executors claim by law. As to the beginning of the will, if it only appointed an executor, and no more, the whole property is disposed of. There was a time certainly, when the Court inclined against the executor, and in favour of the next of kin: but in *Bowker* v. *Hunter*, (a) the law was established in favour of the legal right. In this will there is nothing but surmise upon little circumstances. Giving the executors their expenses is only giving them what by law they had a right to retain; and is merely a cautious act of kindness.

Mr. Richards, *in Reply*, was stopped by the Court.

At law the appointment of an executor is a gift of every thing not disposed of.

The Master of the Rolls.—It is true, at law the appointment of an executor is a gift of every thing not otherwise disposed of. But in equity it is always a question of intention, whether he is entitled beneficially or as trustee; and the question always arises upon the sufficiency of the evidence by which the intention is made out. I apprehend the conclusion Courts have drawn, from the circumstance of a legacy to the executor, was perhaps originally a stretch, and not very conclusive evidence of an intention that he should not take beneficially; for undoubtedly there might be reasons for a legacy consistent with an intention that the executor should take the

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whole. But they have reasoned it thus; that it is giving him part and the whole. That I do not think quite conclusive: but it is now settled, that it raises a presumption against him; which he is allowed to rebut by evidence of the real intention that he should take beneficially.

A legacy to an executor raises a presumption against his legal title to the residue; which he may rebut by evidence.

In this case the circumstances much more strongly indicate the real intention, that the executors should not take beneficially, than a legacy would have done. First, the declaration that she intends to dispose of part of her personal estate, and that it is for that purpose only she makes a will. That amounts to a declaration, that she does not by appointing an executor mean to dispose of the whole; though that appointment standing alone would legally have that effect. That declaration of itself might have been not very conclusive, if the whole tenor of the will was not in perfect correspondence with it: but throughout the testatrix proceeds upon the assumption, that nothing is to go to any one but what she specifically disposes of: for, directing the tax upon the legacy to be paid, she does not in the usual way direct the executors to pay it; but thinks it necessary to give to her executors such a sum of money as may be necessary to pay all these charges and expenses, and makes no further disposition. There she

(a) 1 Bro. C. C. 328.

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stops; having disposed of every thing she means to dispose of. Therefore the conclusion of the will is consistent with what she sets out with. It is said, that may be from caution; that the executors may in all events be safe. But it is evident she did not think such a precaution necessary: evidently supposing a part of her personal property would be sufficient for all the purposes of her will. There is no motive for this special bequest to her executors, except that she supposed it necessary to separate from the residue every thing she meant the executors to have. That was nugatory, if she supposed her estate solvent, and that the executors were to take the re- [230] sidue; for it would be only taking out of their own residue. The appointment of *Mr. King*, not in his individual capacity, as a friend, but in his capacity of Minister from the *American States*, or of such other person, who at her death should be Minister, is not immaterial; aiding the other circumstances. It is evident, therefore, she meant to confer an office only; and the intention is much more clear than it would be from the single circumstance of a trifling legacy to each; which, it is admitted, would be sufficient to exclude the executors. They are therefore mere trustees of the residue for the next of kin.

MILES v. LINGHAM.

June 14. 19. 23.

Return to an attachment for want of appearance "*Cepi Corpus*," but from illness and infirmity she could not be removed: a messenger ordered.

THE defendant *Rebecca Lingham* was taken upon attachment for want of appearance, and still remained in custody. The Sheriff's return upon the attachment was "*Cepi Corpus;*" but that by reason of her weak state of health, extreme infirmity, and the peril of her life, he did not remove her.

Mr. William Agar, *for the Plaintiff*, moved for a sequestration; suggesting a doubt, whether the motion ought not to be first for a Messenger; and afterwards for a sequestration. He cited the Practical Register. (*a*) *Frederick* v. *David.* (*b*) *Wilkinson* v. *Belcher.* (*c*) An anonymous case in *Atkyns;* (*d*) in which, as well as in *Frederick* v. *David*, the Sheriff had parted with the body. *Martin* v. *Kerridge.* (*e*) *Anon. Mose.* 301. *Morrice* v. *The Bank of England:* (*f*) that there may be [231] a sequestration; though the party is not in custody upon the attachment. In *Frederick* v. *David* the party was out of custody; having gone to *Holland:* yet as he once had been in custody, a messenger was sent. In extreme cases the clerk in Court has sometimes been ordered to enter an appearance.

The Lord CHANCELLOR, after some consideration, ordered a messenger.

(*a*) Page 48. (*b*) 1 *Vern.* 344. (*c*) 2 *Bro. C. C.* 181.
(*d*) 2 *Atk.* 507. (*e*) 3 *P. Will.* 240. (*f*) *For.* 217, see page 222.

1802.



June 22.

DANN v. SPURRIER.

Whether a lease for 7, 14, or 21 years, is determinable at either of the intervening periods, at the option of both parties, or of the lessee only, nothing being expressed as to that, Query.

The relief in respect of expenditure under an erroneous opinion of title or an expectation of a larger interest, or that the enjoyment would not be disturbed, with the knowledge and permission of the other party, requires a case of bad faith clearly made out. (1) In this instance it failed for want of evidence.

BY a memorandum, dated the 14th of October, 1791, it was expressed, that *William Atkinson* agreed to take on lease from *John Spurrier* a dwelling house and premises in *Old Broad-street*, to hold for seven, fourteen, or twenty-one years, at the yearly rent of 150*l.* payable half-yearly; including all taxes, to be paid by *Spurrier:* the term and rent to commence from *Christmas* next. The usual fixtures to be taken at a valuation, &c.

Atkinson took possession under this memorandum: but no lease was executed. In *February*, 1797, *Atkinson* agreed to transfer to *Richard Dann* his interest under the agreement. In that month a notice respecting a party wall having been served upon *Atkinson*, he sent it to *Dann;* who enclosed it to *Spurrier* in a letter, dated the 17th of *March*, stating, that he had taken the house from *Atkinson;* and presumed, *Spurrier* had no objection to grant the lease to him; as *Atkinson* informed him, *Spurrier* had only signed an agreement with him; but upon which subject, he, (*Dann,*) added, he would take an opportunity of seeing *Spurrier;* as he found, he must be put to considerable expense, before he could make the house a comfortable residence. On the 20th *Spurrier* * returned an answer; suggesting, that the notice should not be sent to him; considering the house as belonging to *Atkinson* only; and as to his, (*Spurrier's,*) consent to *Atkinson's* parting with the house to him, (*Dann,*) or any other gentleman, he could not decide, till an old account between him and *Atkinson* was settled; adding, that, when *Dann* should have taken *Atkinson's* sentiments, he should be glad to hear from him.

[*232] No further communication took place at that time; and possession was delivered to *Dann*, in *July*, 1797; who sent to *Spurrier* a draft of a lease, extending the term to twenty-one years; and then began to repair the premises; and laid out near 400*l.* in repairs. *Spurrier* took no notice of that and other letters from *Dann*, inquiring, whether *Spurrier* had perused the lease, until the 4th of *September* following; when *Phipps*, the partner of *Spurrier*, informed *Dann*, that he was directed by *Spurrier* to say, he would not grant any other lease than what *Atkinson* was entitled to under the agreement; and that there were not two years unexpired. This produced a renewal of the correspondence; in which *Spurrier*, upon the 8th of *September* stated, that he considered the agreement as liable to be terminated at either of the periods mentioned thereon, at the option of either party; and appealing to his candour as a professional man, whether it was not so in law, which according to the bill was the first intimation by *Spur-*

{(1) *Wendell* v. *Van Rensellaer*, 1 Johns. Cha. Rep. 354.}

rier, that he considered the agreement as determinable, at the option of either party. 1802.

Under these circumstances the bill was filed by *Dann* and *Atkinson;* praying a specific performance of the agreement; and that the defendant may be compelled to execute a lease for twenty-one years, pursuant to the agreement, containing a power on the part of the tenant to determine the lease, but without such power on the part of the defendant, and an injunction against proceeding in an ejectment; which he had brought upon the expiration of the first seven years; or if the Court should be of opinion, that the defendant had a right to proceed in the ejectment, that he may be decreed to pay the plaintiff the money he had expended in substantial improvements: the bill charging, that the defendant looked on, while the money was laid out, &c.

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The defendant by his answer insisted on his right to determine the lease; and stated, that he knew nothing of the repairs till *August*, and on the 4th of *September* he directed his partner *Phipps* to give notice to the plaintiff, to prevent his incurring further expense.

Mr. Romilly, and *Mr. Stanley*, *for the Plaintiff*.—The first question is upon the construction of this agreement; whether the lease is to be determinable at the will of the lessee only, or of both. Though this question has not been determined, the opinion of Lord *Kenyon* has been in one case strongly declared, that upon such a lease, not expressing, by whom it is to be determined, it is at the will of either: *Goodright* v. *Richardson*. (a) Certainly that question was not before the Court. Upon principle it ought to be at the will of the lessee only; and Lord *Rosslyn* was clearly of that opinion in this case. Words are to be taken most strongly against the grantor, or, in case of a lease, the lessor: *The Bishop of Bath's* Case. (b) The object of the lessor in granting a long term is to induce the tenant to improve: otherwise his object is to grant a short term. The plaintiff's construction therefore is probably nearer the intention; for such an object must be frustrated by the other. To the tenant it is even more disadvantageous from the uncertainty. [234]

The second question is upon the conduct of the defendant. From the correspondence upon the communication of the notice as to the party-wall the plaintiff must have understood, he was to have a longer term than a year and nine months. The defendant stands by; permitting the plaintiff to lay out his money; and during that time gives no notice of his intention. Where a person suffers another to lay out money upon his property, under a supposition, that he has a right, he will be bound by the facts, as he permits them to be understood. *The East India Company* v. *Vincent*. (a) *Stiles* v. *Cowper*. (b) *Jackson* v. *Cator*. (c) This defendant does not positively deny, that he knew, the plaintiff was laying out his money.

(a) 3 *Term Rep.* 462.
(b) 3 *Atk.* 692.

(b) 6 Co. 34.
(c) *Ante*, vol. v. 688.

(a) p. 234. 2 *Atk.* 83.

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DANN v. SPURRIER.

Mr. Richards, for the Defendant, was stopped by the Court.

Lord CHANCELLOR.—Upon the first question, as to the construction of this agreement, after the opinion of Lord *Kenyon* one way, and that of Lord *Rosslyn* the other, I shall put that point in a way for the consideration of a Court of Law.

Upon the second question, whatever may be the conscience upon it, the plaintiff has not used that degree of circumspection and caution, that the Court can act upon the latter part of the prayer of this bill, consistently with the reasonable security of the affairs of mankind. The plaintiff is a professional man. That must be taken into the account; and it is not
[235] pressing these cases, depending upon conscience, too hard to suppose, the defendant would give him credit for acting for himself, as he would for any other person. The fair import of the first letter is, that, meaning, if he became tenant, to be at a considerable expense, he will see the defendant, before he embarks in that expense. After an immediate answer from the defendant, refusing to accept him as tenant, until an old account between him and *Atkinson* should be settled, putting it upon the plaintiff to settle that account, the plaintiff chooses to take possession, and incur expenditure without seeing the defendant, or any further communication with him. A treaty having been proposed, before he should embark in any expense, and nothing further having passed, the defendant thinking, as he swears he thought, that he had a right to determine the lease, might think it a strong act to send him a lease, with an extension of the term, without any communication or explanation, even as to the original term. The defendant swears, that till *August* he knew nothing of these repairs; and that he desired his partner *Phipps* to give the plaintiff notice, for the purpose of preventing his incurring further expense, that there were not two years to come of the term. *Phipps* is not examined for the plaintiff, as he might have been. It is upon the plaintiff to prove, not merely to raise a probable conjecture, but to show upon highly probable grounds, a case of bad faith and bad conscience against the defendant. The plaintiff fails in proving that. *Phipps* did not give the message, as directed: but the defendant is not affected by bad conscience upon that; swearing, he gave that direction.

I fully subscribe to the doctrine of the cases that have been cited; that this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an
[236] erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement; a lessor knowing and permitting those acts, which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw an objection in the way of his enjoyment. Still it must be put upon the party to prove that case by strong and cogent evidence; leaving no reasonable doubt, that he

acted upon that sort of encouragement. I am not satisfied, that the defendant up to the 4th of *September* knew of these repairs. His conscience is not affected by that knowledge that is necessary to authorize the Court to apply the principle; and if not up to the 4th of *September*, there is no foundation for saying, he is affected afterwards; for the letter from *Spurrier* declaring his construction of the agreement, is dated on the 8th of *September*. Taking the repairs to be substantial and proved, the case fails in a material point; that, in order to give a person a larger interest in the property than he derives under the instrument making his title, it must be shown, that with the knowledge of the person, under whom he claims, he conceived he had that larger interest; and was putting himself to a considerable expense, unreasonable, compared with the smaller interest; and which the other party observed, and must have supposed incurred under the idea, that he intended to give that larger interest, or to refrain from disturbing the other in the enjoyment. The plaintiff has failed in that; and has relied on the defendant. Upon that ground therefore this bill cannot be sustained.

Upon the other point a case was sent to law.

BRUMMELL *v.* M'PHERSON.

[237]
June 29.

An infant plaintiff, a ward of the Court, having married, proceedings staid, till the husband shall appear.

THE bill was filed on behalf of infants against executors; praying the usual account, &c. The infant daughter, having become a ward of the Court, married; and then her husband went abroad. The bill was revived.

Mr. Hollist, for the Defendants, moved, that the proceedings might be staid.

The Lord CHANCELLOR granted the motion; saying, he would permit no proceeding to be taken, till the husband appears; and that Lord *Kenyon* refused to permit a proceeding on behalf of a plaintiff, who had married a ward of the Court, and would not appear.

Ordered.

1802.

March 19.
June 30.

KEMP v. PRYOR. (1)

Bill alleging fraud as to quantity and quality of goods sold, not discovered till they were exported to *America*; that they were sold in consequence at a loss; and the plaintiff being threatened with an action paid the original price according to the contract, under a protest, that he would seek relief in Equity; and praying an account and payment in respect to the loss, and a Commission to *America*. Demurrer allowed.

THE bill stated, that in 1799 the plaintiff contracted to purchase from the defendants a certain quantity of red and white lead and yellow ochre, according to sample, for the purpose of exportation to *America*; which was received by the plaintiff in casks, and exported by the plaintiffs accordingly. When the articles were received by the agent of the plaintiffs at *New York*, it appeared, that they were considerably short of the quantity, of very inferior quality, and grossly adulterated; and a great quantity of whiting was packed up as white lead. The agent sold the whole at a loss. The defendants calling for payment, the plaintiff remonstrated; upon which an action was brought: but the credit not having * expired, a non-suit was entered. After the expiration of the time, another action being threatened, the plaintiff paid the money; at the same time by a protest in writing, declaring his intention of endeavouring to get back the money by suit in equity or elsewhere.

The bill, under these circumstances, prayed an account of all and singular the casks and quantities of red lead, and other articles sold, and of the prices and money produced by the sales, and the charges attending the exportation and sale, and the amount of the loss sustained by the plaintiff, in consequence of these transactions; a commission to *America* for the examination of witnesses and that the defendants may be decreed to pay and satisfy to the plaintiff what shall appear due upon the account.

To this bill the defendants put in a general demurrer.

[* 238] *Mr. Richards, and Mr. Pemberton, in support of the Demurrer.*—If the plaintiff paid this money in his own wrong there is a remedy at law. His right to a discovery in aid of an action is not disputed: but this bill praying relief, as well as discovery, under these circumstances, is novel and cannot be supported. The plaintiff cannot be relieved in any Court. He ought to have filed a bill for an injunction, instead of paying the money, knowing the objection. It does not appear upon the bill, that he has commenced an action, or intends it.

Mr. Romilly, Mr. Shuter, and Mr. Toller, in support of the Bill.—The only question is, whether upon the facts of this case, admitted, the plaintiff is entitled to any assistance in equity. The payment was made under the threat of an action;

[239] the plaintiff not being in possession of any evidence, by which he could defend himself. Supposing him entitled to relief at law, still this demurrer must be overruled; for beyond discovery he is entitled to a commission, which takes it out of the rule, that where the plaintiff, though entitled to discovery, is not entitled to relief, a general demurrer lies. (a)

(a) See *Ryves* v. *Ryves*, *ante*, vol. iii. 343, and the cases cited page 347.

{(1) Cited 4 Munf. 134.}

If no relief can be had at law, that will entitle him to relief here: not as a general proposition; but under such circumstances; a gross fraud, from which he could not defend himself at law, merely because he was not then in possession of evidence. Suppose a demand insisted upon, which had been paid, and a receipt given, and the receipt being supposed to be lost, judgment is recovered in an action; and afterwards the defendant discovers the receipt: it is clear, there could be no relief at law: *Marriot* v. *Hampton*: (b) but in such a case, a judgment recovered against conscience, in the face of his own act, it is impossible that equity should not relieve. *Lord Lonsdale* v. *Littledale*, (c) is in favour of the jurisdiction on the ground of fraud; and *Brooke* v. *Hewitt*, (d) shows, that a case under such circumstances should not be decided upon a demurrer without evidence. 1802. KEMP v. PRYOR.

Mr. Richards, in Reply.—Are these defendants to wait the return of a commission from *America?* If there is any remedy, it is at law. The prayer of a commission is not adapted to the case of an action. All that is sought is equitable relief. The discovery is prayed merely as ancillary and necessary to that; and a commission, upon precisely the same ground; the plaintiff not suggesting that he ever intends to bring an action. When a person makes a feeble defence, or [240] finds evidence afterwards, is that a case for equity to interfere; granting relief in the nature of a new trial? Such a jurisdiction, though hinted at in some old books, has been long abandoned. This is a new bill; and in that shape it is, in effect, an action to recover money paid in his own wrong, and damages.

Lord CHANCELLOR.—Upon the best consideration I can give this case, I am of opinion there is considerable risk of doing injustice if I should allow this demurrer; and there is ground enough to think it may be possible, that, when this cause comes to a hearing, a Court of Equity may give relief, even without sending it to law. The bill does not state either an action brought or an intention to bring an action: but there is so much doubt, whether the answer and evidence might not produce a case for equitable relief, that it would be too bold to decide upon a demurrer. I take it these articles were capable of being re-imported, as there is no charge to the contrary. The correspondent or consignee receiving them, perhaps without any communication of the representation as to the quantity and quality, of which the party misrepresenting could not complain, still receives them under circumstances, in which he must dispose of them for the best. This differs materially in circumstances from the case where both live in this country, and the moment the article is found not to answer the description it may be returned. But I doubt whether it may not be held, and whether it has not been held

(b) 7 *Term Rep.* 269. (c) *Ante*, vol. ii. 451. (d) *Ante*, vol. iii. 253.

1802. KEMP v. PRYOR.

by special juries before me, that, in such a case as this, of goods exported, and where the person receiving them abroad cannot return them, the vendee is authorized to sell them for the benefit of the vendor; and may hold him liable in an action for damages to the amount of the difference; giving
[241] him the benefit of the sale in the foreign market. It is stated in this bill, that the sale was at a great loss, occasioned by re-sales, the observations of the customers, and the deficiency of the quantity. I do not go upon the last circumstance; as that is purely matter of law. The vendee not having an accurate and precise account of the produce of the sales, much less clear evidence, enabling him to fix upon the vendor that equity, to which I have alluded, that was administered at *Guildhall*, (for it is an equity,) but having only general information, the first action against him failed, the credit not having expired: but another action being threatened, while he was still in that condition that he could not have the benefit of these circumstances, as a Court of Law could not give him a commission, he paid under this protest, declaring his intention to have the relief a Court of Equity could give him. If he had gone to trial, and could not have had a commission, he would not have been in a better situation without coming to equity for a commission. But I am not prepared to say, that upon that ground it is so clear, this demurrer should be overruled. The plaintiff should have come to equity for that purpose, instead of doing, as he has done in this instance.

Another point, upon which it is not by any means clear that this bill may not be maintained, is, that, if fraudulent conduct may either be confessed by the answer, or proved, I am not sure a person taking the articles under these circumstances has not a right to say in equity, he is entangled in so much of difficulty, as to the point of rescinding the contract by redelivery, that the articles ought not to be considered sold for any other purpose than this; that he may have an issue, if necessary; or, that the quantum of damages may be settled by a Court of Equity; being incapable of being accurately
[242] settled but by an account of the sales, which the vendor made it necessary to have abroad, and of the produce. The bill therefore may be proper in seeking an inquiry into that. Upon that ground I do not feel bold enough to overrule this demurrer; and am disposed, as Lord *Rosslyn* was, to hear the whole of the case, before I decide that relief may not be given in the instance of so fraudulent a contract; considering the consequences, in which the particular circumstances of such a fraud necessarily involve the vendee. I go upon these particular circumstances; that where there is a contract of sale and delivery, and the goods might from the nature of the contract be re-delivered, if under the circumstances they cannot be re-delivered, an equity arises from this; that the party cannot protect himself at law, as he cannot re-deliver: and he was led into that by the misrepresentation of the other. The vendee therefore has a right to the extent of his loss,

the vendor to an account of the sales in the foreign market; and whether the most was made of them; which can only be made out by an account under the particular circumstances. He comes therefore for that account, or, under the prayer of general relief, for an issue; and that he may be paid the balance. Such a case may exist; and I am inclined to think, it does exist upon this bill. 1802. KEMP v. PRYOR.

Soon after the demurrer was overruled the *Lord* CHANCELLOR expressed doubts upon the point; and directed it to be re-argued. The additional arguments in support of the demurrer were to the following effect.

It is not necessary to discuss whether the plaintiff might have recovered the money at law: but if a person pays voluntarily, without coercion of legal process, money, which perhaps, if he had defended himself, he might not have been obliged to pay, a Court of Law even would not assist him to recover back that money; and it would be very dangerous to permit that. But in equity there is no precedent for such a bill. Suppose the payment not voluntary, but under process: that does not make the case equitable. Still it is legal. There was no trust, no fraud, for equity to attach upon. This Court would give a discovery: but when that is obtained, they have an action for money had and received. The defence might have been made at law beyond all doubt; and the question is, whether there is a concurrent jurisdiction. If an action were brought against him, he might have filed a bill for discovery: but he does not even wait for a second action. The commission, being only ancillary to the equitable relief, which cannot be obtained, does not take the case out of the rule established by the modern decisions, that a general demurrer lies. The mere prayer for a commission does not change the nature of the demand, and bring it within the jurisdiction of this Court. The demand is as much at law as the case of a horse purchased which turns out to be unsound. The fraud imputed is cognizable at law, and must be found by a jury. It is not a proper subject of inquiry before the Master. There may be contradictory evidence. If a house is not built according to contract, that question must be at law. *June* 30. [243]

For the Plaintiff.—The mere circumstance that the witnesses reside abroad gives jurisdiction: even supposing the demand to be at law, which however is not admitted. The foundation of this bill is the prevention of a total failure of justice. The principle upon which depositions are read at law is, that they are the depositions of witnesses examined in a cause, in which the same facts were at issue between the plaintiff and defendant in another cause; and the witnesses are out of the jurisdiction, and cannot be produced. It would be quite nugatory to pray, that the plaintiff may have the benefit of the depositions at law. There is no instance of an order, that depositions shall be read at law. The Court has no authority to make such an order: but they are read only upon that ground; [244]

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and the whole principle of that proceeds upon the hypothesis, that the Court of Equity may go on to make the decree; though frequently that is not desired, as in many instances it is more convenient to go on at law. The prayer of this commission is not the same as a mere prayer of discovery. The plaintiff certainly might have filed a bill for an injunction; and now, independent of any relief at law, is clearly entitled to equitable relief; as in every case of fraud. Gross fraud is admitted: and the evidence is out of the kingdom. The plaintiff was under the necessity of selling the goods in *America.* The equity therefore is an account. The profit, that might have been made, cannot be brought forward at law. Suppose the articles supplied had, by mistake, been of much greater value: an account would have been directed. It is a subject for this Court, and no other.

Mr. Richards, in Reply.—The moment the demand was made a bill ought to have been filed for an injunction. All these special circumstances were known to the plaintiff at that time. Upon whatever principle depositions are read at law, formerly it was usual to make an order, imperative upon the party, for that purpose. The mode was probably by an order upon the party to admit the fact proved; which is now the effect of a commission issuing out of a Court of Law. Yet the depositions, when returned from abroad, are not evidence: but it is by way of terms upon granting a favour. It is clear, that, in order to read depositions at law, it is not necessary, that they should be taken in a suit, in which the bill prays re-
[245] lief; which appears from bills to perpetuate testimony, or to examine *De bene esse.* There was formerly considerable doubt, whether, in the former instance, it was necessary that the defendant should put in an answer. I take it the depositions could not be read unless the answer was delayed. The general principle is, that there should be something in issue: but it is enough that one thing is averred, and denied, or not admitted. It would be very singular if a bill merely praying a foreign commission should draw the subject here. There is no instance in such a case, an action also depending, and therefore two suits for the same purpose, where an election was required. In practice therefore, certainly that has not been considered matter of relief. Neither is there any instance of such a bill coming to a hearing. A mistake of the time, or an opportunity missed, cannot give the jurisdiction.

Lord CHANCELLOR.—I still entertain considerable doubt upon this case. I felt much distress upon the point, as a point of pleading; upon which this Court is infinitely more loose than Courts of Law. I do not therefore think it improper in the first instance upon this sort of point, in which I apprehend I had fallen into error, to say, it is not enough upon the argument of a demurrer to conjecture, that, if the cause goes on, there may be some ground for a decree: but the Court is bound

to say that, upon the facts, as stated in the bill, if proved or confessed at the hearing, a decree would be made. 1802.

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This case embraces a great many considerable points; some of them more easy to argue than judicially to dispose of. The observation is fair, (I lay no further stress upon it,) that the articles in question, being sent to a foreign country, could not well be returned; also that it must be at a considerable expense of freight; as there would be an expense for carriage, [246] if they were to be sent to another part of this island; and further, that it might be more difficult at the time of the demand to prove the expense of freight than the other charge; and more difficult to ascertain, what was to be paid, by inquiry, commission, &c. Considering this case first without the fact of the protest, this bill, praying, not that this sum of money may be repaid, but an account of the produce, the charges, and the loss, which I rather think means the damage, not the expense the plaintiff has sustained, combines demands of different natures; but may contain some demand, that upon the principles of this Court, too loosely applied to pleading, may be capable of being sustained. The goods were to be enclosed in casks; not like the instance of the sale of a horse, the party acting upon his own judgment solely. Put the case, not that without the knowledge of the plaintiff the defendants substituted whiting for a considerable quantity of white lead, but that they had taken out the whole, and delivered instead of the article contracted for one perfectly different; that it was exported to *America*, whence it could not be returned without very considerable inconvenience; furnishing therefore a question, that has very often occurred at law, whether a party having received articles from another, not according to his contract, is not justified in doing the best he can for the benefit of the vendor under the circumstances, in which he is placed by the vendor. Suppose the articles not worth the expense of the return: if he is at liberty to do the best for the vendor, it may turn out, that the sale in the market, to which, not his act, but that of the vendor without his consent, had sent the articles, may be the best for the vendor.

The first question would be, whether the vendee could insist it was a sale to him; and he might, I think, insist, upon taking to the article and paying the stipulated price; but that [247] he would bring an action for damages by the breach of the contract, and the loss he had suffered from the sale of an article not according to the contract: or he might have said, the contract had never been executed; and if the declaration in an action by the vendor had contained only a count upon the contract, he could not have obtained a verdict upon the case now made by this plaintiff. But if the vendor disaffirmed the contract, the money received by dealing with the article would have been money had and received for the use of the plaintiff in the action; and under a count for that, if it could be joined with a count upon the special contract, the moment the contract was disaffirmed the plaintiff in the action would have been at

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A. receiving goods under circumstances, that would give him a right to return them, disaffirming the contract, if it would be against the interest of the other to return them, may sell them, considering himself as agent, and bring an action for the difference.

liberty to prove the substance of the account, raising a demand for money had and received. I have a strong conviction upon sound principles, confirmed by my short experience at *Guildhall*, that, if a man under a contract to supply one article supplies another, under such circumstances, that the party, to whom it is supplied, must remain in utter ignorance of the change, until the goods are under circumstances in which it would be against the interest of the other to return or reject them, instead of doing what is best for him, selling them immediately, a jury would have no hesitation in saying, he ought to be considered, if he pleased, not as a purchaser, but as placed by the vendor in a situation in which, acting prudently for him, he was an agent. The consequence then is, that he would be liable to account for the money received, subject to freight and other charges; though, while the goods were *in transitu*, he had considered himself owner.

If that is the law, the questions are, first, whether this plaintiff has so stated himself by this bill; secondly, whether, if he has, that will support the equity. It is almost impossible to say, he has so stated himself upon * this bill. The general aspect of it is rather that of a man who made a contract of purchase; and determines to adhere to it as such. He might have defeated the contract. He might have taken to the article, for which he never contracted; submitting to pay upon the worth of it; and then in an action the value of the goods actually delivered only, not of those which should have been delivered according to the contract, could have been recovered; and if paper had been floating in the world under such circumstances, the necessity of protection might have supported a bill in this Court. But if he had said, he would take to the goods, and leave them to the contract, he would have been entitled to maintain an action for non-delivery of the goods contracted for. The case therefore could not be delivered by any one action between the parties. Suppose it could; and an action was brought against him as agent. Considered in that character, a bill might be filed against him for the specific produce. If he says that as the goods delivered are not those contracted for, therefore he is to be considered their agent, that admits, that they might file a bill for an account of the articles actually supplied; making him just allowances. It is not so clear that he can file such a bill against the vendor; for the principal might not have the knowledge he as agent has. The question then is, whether if in law he has a right to insist that he was agent, and not the purchaser, that character gives him a right to come here, not merely to have the money back, but an account according to the prayer of this bill; and it is not clear, that he might not file such a bill. It is not unusual to say, it is more convenient for this Court to take the whole, though there is some demand at law, than to put some parties in the situation of suing both at law and in equity. Upon some items in many cases there would be demands at law. If the bill could be sustained there might be

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an issue *quantum * damnificatus*. I will not say whether the principle is, that, where there is purely a demand at law, but it is necessary to come here for a commission to support it, that gives this Court original jurisdiction; or whether it must be ancillary only, and the commission is all to which the plaintiff is entitled. It is not necessary in this case to decide that question; for the state of the record does not bring it forward as properly as it ought. But if a bill, upon the face of it, prays relief, and the subject is of equitable jurisdiction, as the delivery of a policy of insurance upon which no legal demand can be made, the practice of withdrawing such bills from further prosecution, when the discovery is obtained, will not induce me to say, this Court has not jurisdiction. In such a case I would know upon what principle that practice can be maintained? Further, I cannot admit, that if the subject would have been a subject of equitable demand previously to the extension of the exercise of the principle upon which a Court of Law is authorized to act in the action for money had and received, that Court sustaining an action they would not have sustained forty years ago, is an answer to a bill that would have been sustained in this Court at that time. Upon what principle can it be said, the ancient jurisdiction of this Court is destroyed; because Courts of Law now, very properly perhaps, exercise that jurisdiction which they did not exercise forty years ago? Demands have been frequently recovered in equity which now could be without difficulty recovered at law; as in the cases in the Exchequer upon policies of insurance; and others, in which you may recover money that the policy of the law would not permit to be paid; as payments upon a marriage brocage contract. If a bill was filed for such a purpose, and requiring a commission, it could not be met by demurrer, or otherwise, with the objection, that the plaintiff might obtain the relief at law; and the Court of Law could by imparlances give the benefit of a commission, which this Court had been in the habit of giving. I cannot hold that the jurisdiction is gone merely because the Courts of Law have exercised an equitable jurisdiction, more especially in the action for money had and received. I agree, that, where money could only be recovered at law, the prayer for a commission will have no other operation in this Court than the mere consideration of the question of jurisdiction, as founded upon the simple fact, that a commission is prayed, would give it.

The extension of the jurisdiction of Courts of Law in modern times to cases, that formerly were subjects of equitable jurisdiction exclusively, has not destroyed the jurisdiction of Courts of Equity. (1)

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The view of this case produces this dry point; whether there is a sufficient averment that there is that case, in which, independent of the commission and what the law would do, this Court would have entertained jurisdiction; and I am distressed upon this; that if he has a right to say he is agent, it is clear I cannot deliver him from the responsibility under which he stands in that character, and a bill might be filed

{ (1) See *Spencer & White* v. *Wilson*, 4 Munf. 130. pl. 1. and *Duvals* v. *Ross*, 2 Munf. 290. pl. 1.}

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against him for an account, upon the principle that he is a mere agent. My first inclination was strong in favour of the bill. I soon thought that wrong; and am still so inclined, with considerable difficulty upon it; even supposing it to be without the circumstance of paying the money, which has very much enhanced the difficulty; for it is paid as money, the quantum of which was due upon the contract; and, if not so paid, still it was received so; and upon the mere form of the protest, not acquiesced in, there would be great difficulty in maintaining an action, if the commission was returned, and all the witnesses were here. If so, the principle of distinction in equity must be found, authorizing the Court to say, that, though the relief to be given in equity is of the same species as, if the money had not been paid, would have been given at [251] law, yet, notwithstanding all resource at law by an equitable action is cut off, an equitable suit shall be maintained here. I think there is difficulty insurmountable upon that. The plaintiff thought fit to pay the money under this loose protest, that he would seek relief in equity or elsewhere. The obvious mode would have been a bill for an injunction, instead of taking a step which renders it almost impossible to give him relief upon any bill. The result therefore, I rather think, is, that this demurrer will lie.

Demurrer allowed.

July 1.

IVESON *v.* HARRIS.

A proceeding upon a bail-bond in the Marshalsea Court, assigned according to the practice of that Court to one of the officers, is not a proceeding against a prohibition, restraining the original action, so as to incur a contempt

Whether a prohibition issued from the Court of Chancery, without application in Court, upon an affidavit, stating merely, that the cause of action arose out of the jurisdiction, not adding, that foreign plea was tendered, and refused, is regular, *Query*.

But if it is irregular, any proceeding against it is a contempt. The party ought to apply to the Court to supersede it. The form of the affidavit to be altered in future.

A MOTION was made for an attachment against the officers of the Marshalsea Court under these circumstances. An action had been brought in the Marshalsea Court by *Joseph Iveson* against *Harris* for a simple contract debt of 20*l.* arising out of a transaction concerning the sale of a public house. In that action a bail-bond was given; which, being forfeited, was assigned to *Edwards*, an officer of the Court; and a writ of *capias* was sued out against *Harris* and his two bail. Within two hours after the assignment of the bail-bond, and before any proceeding upon it, a writ of prohibition against proceeding in the cause of *Iveson* v. *Harris* was served upon the officer of the Marshalsea Court; of which notice was given to the attorney. The writ was issued by the cursitor, without any application in Court, upon an affidavit, that the cause of action arose out of the jurisdiction. At that time, in the vacation, the other Courts were not sitting.

[* 252] *Mr. *Mansfield*, and Mr. *Johnson*, in support of the Motion.—There can be no doubt, that these persons are guilty of a contempt. It will be objected, that the prohibition is irregular;

having issued before plea in the Marshalsea Court, that the cause arose out of the jurisdiction; and certainly the common rule is in favour of that objection; unless it appears upon the face of the declaration to be out of the jurisdiction. But the course of the cursitor's office has been immediately to issue a prohibition to restrain that Court in particular from proceeding: the cursitor making out the writ upon the affidavit, without any application to this Court. It is at least not clear, that the prohibition was irregular. There is a great variety of *dicta*, that it shall not issue till foreign plea tendered, and refused. The most recent case is in *P. Williams;* (a) and the ground there stated is, not, that foreign plea was not pleaded before the application, but that the party had imparled generally; and could not then plead a foreign plea. It would increase the expense to prevent the application till foreign plea tendered and refused. This must be considered a proceeding upon the original action; which was determined upon great consideration by the Court of Exchequer in *Bolt* v. *Stanway.* (b) In this way they have the fruit of their first proceeding.

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But, supposing this prohibition to have issued irregularly, the contempt in proceeding, while it was depending, is not the less. The plaintiff below ought to have applied here, instead of proceeding in breach of it. Injunctions have been obtained in this Court, and the Court of Exchequer, very improperly; in some instances by direct perjury: but it was never supposed the party might proceed, while the injunction existed. The constant course is to apply to the Court; and great mischief would follow from permitting persons so to speculate. [253]

The Attorney-General, and Mr. Richards, contra.—Upon the affidavits these parties have not proceeded against this prohibition; which is against further proceeding in a certain action, *Iveson* v. *Harris.* This proceeding is in the name of *Edwards* against *Harris* and his bail. How could the Judge know they were proceeding in the original action? This writ ought to issue upon an application to the Court on affidavit. It is admitted that in the other Courts an application is necessary; and that there must have been a foreign plea tendered; and affidavit of the truth of it: *Sparks* v. *Wood.* (a) The case in the Court of Exchequer is a solitary case, and new. The practice of the Exchequer formerly, where an injunction was obtained that did not apply to the bail, was to apply to have the injunction enlarged; but it was never before held, that you could apply, as for a breach of an injunction by the act of a person who was not a party. There is no pretence for this application against the officers of the Court. They have done nothing, nor had the means, subsequent to the service of the writ.

Mr. Mansfield, in Reply.—This practice has long prevailed: but the strong ground is, that here is a prohibition; and they ought to apply to have it discharged. The act of your Lord-

(a) Anon. 1 *P. Will.* 476. (b) 2 *Anst.* 556. 569.
(a) p. 253. 6 *Mod.* 146.

1802. IVESON v. HARRIS. ship's officer is your Lordship's act. Can it be decided in the Court below, whether that is proper? This is the action of *Iveson;* though this proceeding is in the name of *Edwards*, to whom the bail-bond was assigned; the practice being to assign it, not to the plaintiff, as in the Court of King's Bench,
[254] but to the officer of the Court. But it is the plaintiff's action: the officer lending his name. Unless this is held part of the original proceeding, a prohibition is ineffectual.

The Lord CHANCELLOR.—If this case was to be decided upon the point with respect to the affidavit, notwithstanding this authority in *Peere Williams*, it would be necessary to look to subsequent cases. I cannot conceive that such a practice should have obtained, as I believe has obtained; that upon an affidavit, stating no more than that the cause of action did not arise within the jurisdiction, and adding, that it did arise in another jurisdiction, a prohibition should issue without the sanction of the Chancellor; and I believe, it has been said in later cases, that such an affidavit is sufficient. I confess, I think, what is stated in *Peere Williams* proceeds more upon the reason of the thing than the contrary practice; for, if the affidavit states no more, the prohibition may be granted, when upon the record of the inferior Court the objection to the jurisdiction may have been waived by the defendant himself: that is, he may have pleaded so that it is incompetent to him to stay the proceedings afterwards. If he has pleaded to the jurisdiction, he can plead nothing inconsistent with it; and therefore must not have done any thing to give the Court jurisdiction. If the practice of this Court, founded upon the orders of the Chancellor, has been, that a prohibition should issue upon such an affidavit, it is to be considered, whether that practice shall continue, or be corrected according to this case in *Peere Williams*. But, whether right or wrong, it is clear this Court can hardly hear an inferior Court discuss with it, for any purpose but to have the proceeding superseded, the question, whether it issued improvidently. That is a question for the consideration of the Court out of which the writ is-
[255] sued, not of the Court to which it is addressed. It is of the last consequence not to suffer a breath of doubt to hang upon this point; that an inferior Court is not to disobey any of the writs issuing out of this Court upon their notion, that the writ issued improvidently. Therefore, though this writ might have improvidently issued, I should without doubt have held a proceeding in breach of it a contempt.

The next point is, what has this writ prohibited? The fact prohibited is proceeding in actions upon contracts, covenants, or trespasses, done without their bailiwick or power, and therefore such contracts, &c. in a proceeding, in which *Harris* is called upon to answer *Iveson*. Is this that proceeding, in which those parties can stand as such upon any pleading, that can be put upon the record of that Court? This is not a case in which *Harris* is to answer *Iveson* upon any contract between

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them. It is not upon the same sort of contract. The one is upon a debt by simple contract: the other upon a specialty debt. It is said, a prohibition is ineffectual, unless this is held part of the original proceeding. I do not think so; for if the party can put such a plea upon the record as will give the Court jurisdiction, I do not see, why he may not by doing the act, or forbearing, give them jurisdiction. If the declaration does not state any thing taking away their jurisdiction, of which they must take notice, it is the duty of the defendant to appear, and give information to the Court, that their jurisdiction does not attach upon him; and if that is his duty, they have a jurisdiction to call upon him to give a security to perform that duty; and they call upon him and two persons to enter into a bond, by which a contract arises, in addition to the contract which is the cause of the first action, that if he does not according to that duty appear and answer, the obligee shall have a cause of action arising from his default in not doing what [256] he agreed to do; a perfectly different action.

Another difficulty arises upon another consideration. How am I to make out, unless upon the case in the Court of Exchequer, which certainly seems contrary to what were the familiar notions of this Court, that a prohibition, not permitting one suit upon one contract, to go on between those two parties, is a prohibition not permitting another suit upon another contract of a different nature, between other parties; several of them not being parties to the original contract? It is said, if this is permitted, they have the fruit of the first proceeding; and that is true; but, not as the fruit of the first proceeding, but as the consequence of an engagement, which the party to the first proceeding entered into, that he would do an act which he has not thought proper to do. The cause of action, therefore, is quite new: for instance, if time had elapsed, the same plea of six years could not be pleaded. As it was the right, as well as the duty, of the defendant to appear, and state, that the Court had no jurisdiction, the question is, whether he may not waive that by a new and distinct contract, giving a new and distinct cause of action. Notwithstanding the case in the Court of Exchequer, I am of opinion the prohibition to the original plaintiff is not a prohibition to the obligee in the bond. He must be a party; and is not guilty; the writ not ordering him to do, or to forbear from doing, any thing. Upon this part of the case, therefore, it is very clear, the proceeding upon this bond is not a contempt. I do not see my way to follow the principle of that authority in the Court of Exchequer in the application of it to the case; and I have no conception that it is competent to this Court to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause. The old practice * was that he must be brought into Court, so as according to the ancient laws and

Injunction not binding upon a person not a party in the cause. (1)

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{ (1) *Fellows* v. *Fellows*, 4 Johns. Cha. Rep. 25. }

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IVESON v. HARRIS.

usages of the country, to be made a subject of the writ. The jurisdiction in lunacy is quite distinct.

Mr. Romilly, (amicus curiæ,) said, upon his motion a writ had been quashed by Lord *Rosslyn;* who held, that the practice was still according to the case in *Peere Williams.*

The Court of Chancery always open; and therefore can issue a prohibition in the vacation.

The Lord CHANCELLOR remarked the distinction, that the writ of prohibition may be had in the Court of Chancery in the vacation: that Court being always open.

July 3.

The Lord CHANCELLOR.—There was a case, upon the 27th of *March*, 1776: a prohibition; and the affidavit did not state the fact, whether the defendant had pleaded; but stated merely, that the cause of action arose out of the jurisdiction. It turned out afterwards, that there was a plea of the general issue in the Marshalsea Court; and the writ was discharged with costs. There was another case, in *December*, 1776, and another in 1787, in which the same rule was laid down. Those are therefore authorities in support of the case before Lord *Rosslyn.* According to practice in the cursitor's office that affidavit was considered sufficient. But I think it right that another form should be followed in future; and will make an order for that purpose. I doubt, whether the decision in *Bolt* v. *Stanway* is right. I find the Court has adhered very closely to the principle, that you cannot have an injunction except against a party to the suit. Upon a review of all the cases, I think the practice of granting an injunction against a creditor, who is not a party, is wrong. The Court has no right to grant an injunction against a person whom they have not brought, or attempted to bring, before the Court by subpœna; and in the ordinary case of an injunction after a decree, in the absence of a creditor, no one appearing for him as counsel, which
[258] might make a difference, I should hesitate very much to proceed against him for breach of the injunction. In this case I am clearly of opinion, the writ of prohibition did not extend to the second action. *(a)*

(a) BROWN *v.* IRVIN. *March* 27, 1776, a writ of prohibition discharged with costs, upon the ground, that it appeared by affidavit that the cause of action in the Mayor's Court did not arise within the jurisdiction of that court, and that the defendant pleaded the general issue *non assumpsit,* and not to the jurisdiction of the Court, and thereby submitted to it. In this case the defendant did not appear upon the motion, and the prohibition was obtained after verdict.

KING *v.* JEWELL. *December* 18, 1776, writ discharged without costs, because the defendant had not pleaded to the jurisdiction of the Sheriff's Court of London. The motion was opposed, and the prohibition was obtained after verdict.

CREESE *v.* IRVIN. *February* 12, 1787, writ discharged, upon the ground that the defendant had not pleaded that the cause of action did not arise within the jurisdiction of the Sheriff's Court of London, and that part only of the money sued for by the plaintiff was advanced within the jurisdiction of that court. This motion was opposed, and the prohibition after verdict.

1802.
July 2.

PLUME v. PLUME.

A son placed by his father in business, accounting to his father for all the profits, deducting only the expense of his board, having made no demand for wages during his father's life, was held not entitled as a creditor after his father's death; (1) or, if he had a demand, it was satisfied by a will, giving him a legacy to a greater amount, and other benefits. (2)

PLUME, residing and carrying on business at *Hoddesdon* in *Hertfordshire*, placed his son *Jeremiah*, who had been employed for some time with a tradesman in *Southwark* at a guinea a week, at *Enfield*, at the distance of fourteen miles from *Hoddesdon*, in the business of a cooper. The son, while he conducted this business, rendered accounts to his father from time to time; receiving no wages; and merely deducted the money expended for his board. Afterwards the father by his will gave all his estate and effects to his executors; directing them to carry on the trade for two or three years, and to make an inventory of his effects, and to make a separate inventory of his estate, effects, &c. at *Enfield;* and from the amount * of the appraisement of those effects to deduct 60*l.;* which he gave to his son *Jeremiah;* and he also gave to his said son 10*l.* on condition of instructing his brother in the trade; and the residue he directed to be paid by instalments of one, two, and three years; and all the residue he directed to be divided among his other children, by name, omitting *Jeremiah.*

After the death of the testator, the bill was filed by the other children against *Jeremiah;* praying an account of debts, &c. received by him in the management of the trade.

The defendant, who never claimed as a creditor of his father during his life, now set up a claim of 48*l.* as wages due to him [* 259] for his trouble in carrying on the trade for one hundred and twenty-nine weeks.

Mr. Romilly, and Mr. Johnson, for the Plaintiffs, insisted, that the legacy of 60*l.* must be taken as a satisfaction of the debt claimed by the defendant.

Mr. Bell, for the Defendant.—This son, under these circumstances, completely emancipated, having been employed by his father in conducting his business at *Enfield*, must stand in the same relation to his father as any other journeyman; and is entitled equally to a remuneration for his labour. The general doctrine must certainly be admitted, that a debt is satisfied by a legacy of equal or greater amount; *(a)* though the propriety of that doctrine has been much questioned; and the Court will not incline to extend it. *(b)* But this may be distinguished. It is a debt accruing daily; and a running account. The inference from the legacy of 10*l.* is, that, where the testator in- [260] tends satisfaction, as in that instance, he expresses it. Upon the whole will therefore this sum of money was intended as a gift.

(a) Chancey's case. 1 *P. Will.* 410, and *Mr. Cox's* note.
(b) Ante, vol. iii. 466. 529.

{ (1) See *Little* v. *Jones's Ex.* and *Conrad* v. *Conrad's Ex.* 1 Dall. 111. 130. *Patterson* v. *Patterson*, 13 Johns. Rep. 379.}

{ (2) See the note to *Richardson* v. *Elphinstone*, *ante*, vol. ii. 463.}

1802. PLUMB v. PLUMB.

The Lord CHANCELLOR.—This case must be decided with the plaintiffs. First, I doubt extremely, whether this defendant is a creditor. It appears, that he was employed with a tradesman in the borough; and his father, probably an aged man, having himself an establishment in business in *Hertfordshire*, thinks proper to place him in this establishment as a cooper at *Enfield;* and the will shows the intention, that it was to be the provision for that son; meaning, as has been sometimes done by a father providing an establishment for a son, to keep the profits to himself for his life. This is carried on by accounts rendered to the father by the son, not claiming any thing against his father, during his life, as creditor for his trouble in carrying on the business; but receiving what was necessary for his board; and carrying it on as a person looking to remuneration in this respect; that he was satisfied with a hope, that he should succeed to this establishment hereafter. Conducting it with no other remuneration for the present than his board, but expecting to be hereafter the owner, he made no demand till after the death of his father; who died under the persuasion, that there was no such demand upon him; making this disposition by his will; giving directions with reference to his different establishments; and giving to this son his trade at *Enfield*, and the good-will of the trade, and the opportunity of paying for the actual value of the effects, not the good-will, by instalments in three years, and these legacies; not giving him a share of the residue; which is given to the other children. The intention was to satisfy every demand his son had upon him; and he never conceived his son stood in a relation to him as creditor, or could make any demand. [261] This case is very different from that of a perfect stranger upon a question of implied *assumpsit:* in such a case regard being had to the relation, though a son *foris familiated*, and to the expectation of being remunerated which that relation gives; attending also to the circumstance, that the son lived in that employment one hundred and twenty-nine weeks, and never made any demand whatsoever.

Therefore decree for the plaintiffs, but without costs, if the defendant will settle with them immediately without further trouble.

1802.

June 17.
July 3.

Ex parte HALL.

A person having an interest under a contract with the lunatic, permitted to traverse.

The Lord Chancellor inclined to quash the inquisition: the commission not having been executed near the place of abode; and an order, that the lunatic should have due notice, having been disobeyed.(1)

THE prayer of this petition was, that an inquisition taken under a commission of lunacy may be quashed; or that the petitioner may be at liberty to traverse. The party had been found a lunatic since 1792. The petitioner, as having an interest in respect of a contract with the lunatic for two advowsons, impeached the execution of the commission; first, on the ground, that it was executed in *London;* and not at *Bath*, where the lunatic resided; secondly, that notwithstanding the Lord Chancellor had ordered, that he should have due notice of the execution of the commission, only two days notice was given; and that was given to a person who acted as his solicitor, whom it was sworn he distrusted. The commission issued on the 7th of *May*, and was executed on the 14th. The excuse alleged for deviating from the order was, an apprehension that the party would not attend.

Mr. Romilly, and Sir Thomas Turton, in support of the Petition.—Your Lordship's order not having been obeyed, * this [* 262] proceeding ought not to be permitted to stand. Upon the affidavits it is clear this person was not a lunatic at the time the commission issued. But all that is to be decided upon an application to traverse, is, that the petitioner is interested. In *Ex parte Morley*, before Lord *Rosslyn*, the case was, that a glazier at *Brentford* had purchased *Gunnersbury House*. His friends took out a commission. The person with whom he contracted applied for leave to traverse. Lord *Rosslyn* was of opinion, upon the affidavits, that he was insane; but observed, that he had only to determine, whether the person applying had an interest. The result was, that he turned out to be insane.

Mr. Mansfield, and Mr. Harvey, contra.—It is not clear that there is a right to traverse. It seems as if the lunatic himself has the right: but as to a person interested in the property, the constant habit of coming to your Lordship for leave, upon affidavits, implies the contrary. (a)

Mr. Romilly, in Reply.—There can be no doubt that a person who has entered into a contract with the lunatic may traverse. The statute (b) directs that any person aggrieved may. The commission is to be executed near the place of abode, and before a jury of the county where the party lives. The petitioner does not insist, as a matter of right, that the commission should be quashed; but states that rather as *amicus curiæ*. It is clear, due notice was not given to this person. He ought to have had notice sufficient to enable him to bring witnesses from *Bath;* where he had lived the two last years.

(a) *Ex parte Wragg, Ex parte Ferne, ante*, vol. v. 450. 832. See also *Ex parte Ward, ante*, vol. vi. 579. (b) Stat. 2 *Edw.* VI. *c.* 8.

{ (1) See *Chase* v. *Hathaway*, 14 Mass. Rep. 222. }

1802. *Ex parte* HALL.

The Lord CHANCELLOR.—There are two views in which this case is to be considered: first, as to the right of the petitioner to traverse. It strikes me as extraordinary to say, that a person, who had become the *bonâ fide* owner in equity of two advowsons under contract, is not aggrieved by the finding, that the party with whom he contracted has been a lunatic ten years. If, however, decisions would exclude him, he would be entitled only to that regard, which the Court has been in the habit of giving in lunacy particularly. But the case *Ex parte Morley* proves, that a person under such a contract is a party aggrieved; and I am of opinion upon that case, he has a right, and must be permitted, to traverse.

I have some doubt upon the other point, whether this commission ought not to be quashed. This person is found a lunatic not only at the date of the commission, but from 1792: a person, who at many periods since, and up to *April* last has been, with the knowledge of all persons, who had either any interest in, or feeling about, the management of his affairs, doing all the acts the most sane man is intrusted to do. With regard to his occupations, amusements, mode of life, and every circumstance belonging to the question of sanity, he has for ten years been permitted to act at his own discretion, without any providence; and it is now avowed, that, so long as a particular topic, (about a forged will,) was not resorted to, for the purpose of inducing him to dissipate his fortune, his family permitted him to act without restraint. There certainly may be persons, proper objects of this commission, and understood to be so for many years, to whose case, either from true affection, or mistaken tenderness, the proper process may not have been applied. There may be proper persons, insane upon particular points, who, if these [264] points are not touched upon, not only act discreetly in their own affairs, but even as trustees for others. I do not doubt the fairness of their motives: but it is of the last consequence, that the officer intrusted with this jurisdiction should be very careful before he establishes the lunacy of a person ten years ago, who has for those ten years been permitted to act as if sane, and to deal with a great variety of persons; all of whom are entangled in the consequences.

I cannot permit any other person to judge of the propriety or impropriety of my order. I cannot delegate this authority to any one. The order, that the jury shall be of the neighbourhood, is usual; and is consequential upon the direction, that the commission shall be executed at the place of abode. I ordered due notice to be given under the circumstance, that this person had been trusted every where as a person whose conduct did not call imperiously for restraint. It had not escaped me that he might not attend. I thought, he would attend: but if not, that circumstance upon such a proceeding for his benefit would have induced me to let it go on. But, supposing my direction indiscreet, in the exercise of so important a discretion, in the case of a person treated as sane,

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and now represented to have been insane all this time, it is not right to permit any departure from my direction, not authorized by me. At present, therefore, I hesitate very much, whether this commission must not be quashed.

July 3.

A few days afterwards the *Lord* CHANCELLOR said, under all the circumstances, after what had passed, it was not advisable to quash the inquisition. Leave was therefore given to the petitioner to traverse. The issue was, whether the party was a lunatic at the time of the inquisition, and at the date in 1792, and since.

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July 2, 3.

Specific performance decreed: the abstract, though delivered very late, and under a notice, that the vendee would insist on his deposit with interest, if the title should not be made out, and possession delivered by the time of payment, having been received and kept without objection; and the vendee upon the construction and the circumstances not being entitled to insist on the time, as the essence of the contract.

An agreement signed by one party only good to charge him within the Statute of Frauds. A defendant cannot get rid of a disclaimer without a strong case on affidavit.

THE plaintiff in the first of these causes, being entitled to an estate, called *Kilorough*, in the county of *Glamorgan*, under a contract entered into in 1799, by the trustees of the Marquis *De Choiseul*, to convey to him and his heirs in consideration of 8500*l.* employed *Josiah Phipps* to sell the estate by auction or private contract; and the following memorandum in writing, dated the 12th of *April*, 1800, was signed by the defendant *Robert Slade*, but not by the plaintiff or any one on his behalf: "I *Robert Slade* of Doctors Commons in the city of *London* "Esquire have this day purchased of *Josiah Phipps* the estate "described in the within particular at and for the sum of "10,000*l.* including the timber and underwood growing there-"on have paid a deposit of 1000*l.* do hereby undertake and "agree to pay the remainder of the purchase money and com-"plete my purchase within two months from the date hereof "the proprietor making a good title thereto at his own ex-"pense and executing a proper conveyance to be prepared at "my expense And I do further agree to pay for the fixtures "household furniture at a fair valuation and for the growing "crops seeds fallows &c. in the same way according to the "custom of the country and possession to be given upon the "completion of the contract to which time all out-goings are "to be cleared up and I am entitled to the rents and profits "Upon failure of my complying with the terms and conditions "before-mentioned the deposit money shall be forfeited the "proprietor shall be at full liberty to resell the estate and "the deficiency if any there shall be by such second sale to-"gether with all charges attending the same shall be made "good at my expense."

* The bill in the first cause prayed a specific performance of

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{(1) Cited 1 Johns. Cha. Rep. 374, 4 Desaus. Cha. Rep. 136, and 14 Johns. Rep. 488.}

1802. this agreement; which was resisted under the following circumstances appearing by the answer and the evidence.

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The defendant the day after he signed the agreement wrote to *Phipps* from *Brighthelmstone;* stating objections to the title, and that if the title should not be made out and possession delivered to him by the 12th of *June* then next, he should insist upon having the deposit money returned to him with interest. *Phipps's* letter in answer, dated the 19th of *April,* stated the plaintiff's answer, as given verbally by his solicitor, thus: "*Mr. Seton* desired I would inform you, that he accedes "to your request respecting the interest as a matter of "course." The defendant about the beginning of *May* informed *Phipps,* he had sold out stock for the purpose of being ready with his purchase money; and expressed his surprise, that no abstract had been delivered. He afterwards pressed *Phipps* for the abstract; and proposed that *Phipps* should copy and send in his name to the plaintiff a note written by the defendant, expressing that finding no progress made in the delivery of the title, he called to remind *Phipps,* that in the event of its not being completed at the expiration of the two months he expects in compliance with the promise the plaintiff made in answer to his letter from *Brighthelmstone* to have his deposit money returned with interest; and requesting authority to fulfil the engagement on the plaintiff's part. *Phipps* declined writing that letter. On *Saturday* the 7th of *June* the abstract was left at the defendant's solicitors, with a note; stating, that the plaintiff had only a title under an agreement; but all necessary parties were ready to convey; and making a proposal for that purpose. On *Monday* the 9th the plaintiff's solicitor
[267] called there, to say, that he would not vouch for the authenticity of the abstract; as it was not prepared by him, but by the solicitors, for the trustees of the Marquis *De Choiseul.* Nothing further passed till the 13th of *June;* on which day the defendant wrote to *Phipps;* demanding his deposit with interest; and stating his reasons; that the two months, within which the plaintiff agreed to complete the contract, were expired; and the defendant's solicitors had not received an abstract till within these few days; and, so far from showing a right in the plaintiff to convey, it states merely a contract for purchase by him without noticing a suit in Chancery against the trustees of the Marquis and Marchioness *De Choiseul,* previous to the contract for purchase by the plaintiff, which renders it impossible for the plaintiff to carry into effect his agreement with the defendant within the time limited.

The defendant afterwards recovered his deposit with interest in an action. Several objections were taken to the abstract; the principal of which, (mentioned in the defendant's letter of the 13th of *April,*) were the suit instituted by the Marquis *De Choiseul,* and his creditors, to remove his trustees and for an account of their conduct; and a prior contract with a person, named *Darby;* who gave notice of his claim. He was made a defendant; and put in an answer amounting on

the whole to a disclaimer. Afterwards being examined as a witness by his depositions he renewed his claim. The Lord Chancellor held, that he could not get rid of the disclaimer upon the record without a strong case upon affidavit; and therefore he was a good witness; but the defendant reading his depositions must admit, that he has no interest. The defendant then declined reading his evidence.

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The second cause was instituted upon a bill by the trustees of the Marquis *De Choiseul;* praying a specific performance of their contract with *Seton.* [268]

Mr. Romilly, and Mr. Bell, for the Plaintiff Seton.—The question is, whether the vendor was bound to make out his title by a certain day; and further, whether, if he could make a title at a subsequent time, that would not be sufficient in this Court. In all the decisions upon this point time has been considered a circumstance merely, not of the essence of the agreement. It is true, in modern cases parties have been discharged, where in former times they would have been bound: the late decisions having restrained the unlimited extent of the older cases. But they have never gone the length, that, if the agreement is not performed at the particular day, it shall be at an end. In the common case of relief against the penalty of a bond, prior to the Statute, (a) could any declaration of the parties have prevented that? The result is, that the non-performance at the day is a circumstance to show abandonment, but only a circumstance. In *Gregson* v. *Riddle* (b) the agreement was for a particular day; with a proviso, that in case the title should not be approved in two months, the agreement was to be void, and of no effect. There was an outstanding legal estate, which could not be got in by that time. A bill was filed for that purpose to have the legal estate conveyed. The defendant resisting, a reference was directed, to see, whether a good title could be made; Lord *Loughborough* expressing an opinion, that the terms of the agreement were complied with. The report was in favour of the title. The cause coming on before Lord *Thurlow*, the performance was still resisted. Lord *Thurlow* said, it had been often attempted to get rid of agreements upon this ground, but never with success. The utmost extent was to hold it evidence of a waiver of the agreement: but it never was held to make it void. *Mr. Mansfield* for the defendant said, the intention was clearly to make it void; and that it would be necessary to insert a clause, that notwithstanding the decision of the Court of Chancery it should be void. Lord *Thurlow* said, such a clause might be inserted; and the parties would be just as forward as they were then. [269]

That case is much stronger than this. Here there was no necessity for performance at the day.

Mr. Richards, and Mr. Leach, for the Defendant Slade.—The

(a) Stat. 4 and 5 *Ann.* c. 16.
(b) In Chancery, before the Lords Commissioners 12th *June*, 1783; before Lord *Thurlow*, 12th *June*, 1784. Cited by *Mr. Romilly* from his own note.

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general principle is, that in Equity, as at law, the plaintiff must show, that he has performed every thing incumbent on him. There is no instance of a decision, treating the time as immaterial, without circumstances amounting to a waiver; though the language of the Court has been more extensive. Upon the face of this agreement it is to be performed within two months; and there are no circumstances showing a waiver. *Under this express engagement would this Court have restrained an action against the auctioneer for the deposit of 1000l.; or have prevented the vendor from setting up the estate again, if the vendee had made default? No authority* goes to that extent; and it is to avoid this that the clause is introduced. Then the vendee has an equal right to hold the vendor to the time. It is idle to say, the time is not material. If it is not adhered to, it may be ruin of the party, acting upon that, contracting debts, &c. A decision always referred to upon this subject is *Gibson* v. *Patterson*; (a) the report of
[270] which is corrected in *Lloyd* v. *Collet*, (a) and *Harrington* v. *Wheeler*. (b) *Lloyd* v. *Collet* is a direct decision for this defendant; differing only in the circumstance, that no abstract was there delivered within the time. In all these cases, and *Pincke* v. *Curteis*, (c) and *Fordyce* v. *Ford*, (d) the language of the Court is, directly opposite to what it was formerly, that time is material. In *Spurrier* v. *Hancock* (e) the time was extended by the tacit consent of both parties. It is important, that this defendant, the very day after he signed the agreement, expressly stated his title to insist upon the time; and *Phipps* in his answer assents to that.

The Lord CHANCELLOR.—There have been several very hard cases under the description of the specific performance of agreements, upon the principle of compensation: that, for instance, where a person contracted for an estate in *Essex*, with the object of becoming a freeholder of that county; and it turned out to be in *Kent*: yet he was held to it. (f) So in a case before Sir *Thomas Sewell*, upon an agreement for a leasehold house with a wharf, the object of the purchaser being to be a wharfinger, he was compelled to take the house without the wharf. So, where the object was to purchase an estate tithe-free; and he was compelled to take it subject to tithe. (g) The value of the tithe is not a compensation. I incline much to think, notwithstanding what was said in *Gregson* v. *Riddle*, that time may be made the essence of the contract: but I do
[271] not recollect a case, where an abstract was delivered for the purpose of preparing a conveyance; at the delivery no objection made, that it was delivered too late; and between the de-

(a) 1 *Atk.* 12. (a) p 270. 4 *Bro. C C.* 469. *Ante*, vol. iv. 689. n. (b.)
(b) *Ante*, vol. iv. 686. *Wynn* v. *Morgan*, *ante*, 202.
(c) 4 *Bro. C. C.* 329. (d) 4 *Bro. C. C.* 494. (e) *Ante*, vol iv. 667.
(f) *Shirley* v. *Davis*, in the Court of Exchequer: cited *ante*, 678, in *Drewe* v. *Hanson*.
(g) Lord *Stanhope's* case, in Chancery, before Lord *Thurlow*; cited *ante*, vol. vi. 678, in *Drewe* v. *Hanson*.

livery and the time for the execution of the conveyance, no objection stated either to the time of the delivery or the nature of the title. The abstract certainly was delivered very late: but it is upon the party to say, it was too late. If he receives the abstract without objection, does he not authorize the other to suppose, he is during the currency of the rest of the time preparing his conveyance, and the thing is to go on? 1802. SETON v. SLADE. HUNTER v. SETON.

For the Defendant.—The delivery of the abstract was a mere mockery. It could not possibly be imagined, that it could be looked through in time. It was incumbent upon the vendor to have some communication with the vendee, to do away the effect of his letter. It would be a new decision, that the delivery of the abstract to the solicitor, the vendee having declared absolutely, that he would not let it go beyond the time, shall amount to a new contract. No diligence could have enabled the vendor to perfect his title by the 12th of *June*, on account of the claim of *Darby*, and the suit in this court.

Mr. Romilly, in Reply.—This agreement is not the same as if the vendor had undertaken expressly to make out his title in two months. The defendant's undertaking is conditional, to pay his purchase-money. There is no such principle, that time is essential here as well as at law, and that it is always dispensed with upon the conduct of the party. That would exclude Courts of Equity from a great part of their jurisdiction. The only ground for the redemption of a mortgage is, that the time is essential at law, yet in Equity, as the real transaction is a loan of money, and the party may be put in as good a situation, it shall not be so considered. In those cases a *dictum* of Lord *Thurlow* has been frequently alluded to; [272] that, if a clause was inserted, excluding the jurisdiction of this Court, if the mortgager should not redeem within a year, still the mortgager would be entitled to redeem. There are no words in this agreement, showing, the parties meant this time strictly. It was inserted merely because it is usual to fix a time. The vendor could not have re-sold at the end of two months, and charged the defendant with the deficiency. The defendant's letter shows, he did not understand the period of two months to be binding; desiring a fresh agreement for that purpose. *Phipps's* letter proves nothing. He was not agent for any such purpose; and the information was given to him only; and the answer is merely, that *Seton* acceded to his request as to the interest as a matter of course; as it certainly was; not, that, if the contract should not be performed within two months, there should be an end of it. The objection, that it was impossible, that the conveyance could be prepared in time, should have been made when the abstract was delivered. But suppose the title perfect; that it had received the sanction of eminent conveyancers; that many estates had been sold under that abstract; and that the person, to whom it was sent, was already conversant with the title: in that case the conveyance might have been prepared in time. The defendant held the vendor bound till the 12th of *June*.

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The Lord CHANCELLOR.—If it were necessary for the decision of this case, to express myself with great accuracy upon the principle of the Court as to suits for specific performance, as far as objections are to be founded upon what the Court has done, and has forborne to do, in a great variety of cases, in which the objection has been taken, that the agreement was not carried into execution within the time stipulated upon the face of it, I should think it my duty to look through a great number of cases. But, in the view I have of this case, I incur no hazard of making a decree in its principle inconsistent with any authority that can be stated.

Time not regarded in this Court, as at law: (1) for instance the case of redemption of a mortgage; which cannot be prevented even by special agreement.

To say time is regarded in this Court as at law, is quite impossible. The case mentioned of a mortgage is very strong: an express contract under hand and seal. At law the mortgagee is under no obligation to re-convey at that particular day; and yet this Court says, that though the money is not paid at the time stipulated, if paid with interest at the t imea; re-conveyance is demanded, there shall be a re-conveyance upon this ground; that the contract is in this Court considered a mere loan of money, secured by a pledge of the estate. But that is a doctrine upon which this Court acts against what is the *primâ facie* import of the terms of the agreement itself; which does not import at law, that, once a mortgage always a mortgage; (2) but equity says that; and the doctrine of this Court as to redemption does give countenance to that strong declaration of Lord *Thurlow*, that the agreement of the parties will not alter it; for I take it to be so in the case of a mortgage; that you shall not by special terms alter what this Court says are the special terms of that contract. Whether that is to be applied to the case of a purchase is a different consideration. I only say, time is not regarded here as at law. So in the instance of a mortgage with interest at 5 *per cent.* and a condition to take 4, if regularly paid; or at 4 *per cent.* with a condition for 5, if not regularly paid. At law you might in that case recover the 5 *per cent.* for it is the legal interest. But this Court regards the 5 *per cent.* as a penalty for securing the 4; and time is no further the essence, than that if it is not paid at the time, the party may be relieved from paying the 5 *per cent.* by paying the 4 *per cent.* and putting the other party in the same condition as if the 4 *per cent.* had been paid: that is, by paying him interest upon the * 4 *per cent.* as if it had been received at the time. So in this Court before Courts of Law dealt with a bond, under a penalty, as they do now. Time was of the essence there: but this Court relieved against the penalty long before a Court of Law; and there are many other instances.

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So upon a mortgage at 5 *per cent.* with condition for 4, if regularly paid, or at 4 *per cent.* to have 5, if not regularly paid: the 5 *per cent.* regarded in this Court only as a penalty to secure the 4, and relief given upon that principle.

So in the old cases upon relief against the penalty of a bond, before the jurisdiction at law.

But there is another circumstance. The effect of a contract for purchase is very different at law and in equity. At law the

{ (1) *Brashier* v. *Gratz*, 6 Wheaton 528. *Waters* v. *Travis*, 9 Johns. Rep. 450. *Hepburn* v. *Auld*, 5 Cranch. 262. See 3 Bibb's Rep. 367. 3 Serg. & Rawle. 432.}

{ (2) See 2 Binn. 43. 1 Yeates. 584.}

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estate remains the estate of the vendor; and the money that of the vendee. It is not so here. The estate from the sealing of the contract is the real property of the vendee. It descends to his heirs. It is devisable by his will; and the question, whose it is, is not to be discussed merely between the vendor and vendee; but may be to be discussed between the representatives of the vendee. Therefore I do not take a full view of the subject upon the question of time, unless that is taken into consideration; and many very nice and difficult cases may be put, in which the question would be to be discussed between the representatives, founded upon the conduct between the vendor and vendee. It is obvious, that a due consideration of the value of the objections will embrace that consideration also.

From the execution of the contract, the estate is in equity the property of the vendee, descendible and deviseable, as such.

The cases seem to have varied a good deal. The cases before Lord *Thurlow* proceed upon this; that in the nature of the thing there must be a degree of good faith between the parties, not to turn round the contract upon frivolous objections. As to the contract of the party the slightest objection is an answer at law. But the title to an estate requires so much clearing and inquiry, that unless substantial objections appear, not merely as to the time, but an alteration of circumstances affecting the value of the thing, or objections arising out of circumstances, not merely as to time, but the conduct of the parties during the time, unless the objection can be so [275] sustained, many of the cases go the length of establishing, that the objection cannot be maintained: even the later cases; which have given great weight to the objection; particularly *Harrington* v. *Wheeler*, (a) referring to older cases, particularly two in the House of Lords. The objection was not put merely upon the conduct in not making the title in time, but upon the circumstances, connected with the thing and the value of it.

But I need not address myself to the consideration of what is the precise principle with much industry; for no authority would support me in saying, that under the particular circumstances of this case the defendant can resist a decree, if a good title can be made. This agreement is signed by the defendant *Slade* only: but that makes him within the statute (b) a party to be charged. (1) I do not say, whether terms might or might not be introduced, that would make time expressly of the essence of the contract. It is enough to say, that, if this agreement has that effect, there never was an agreement, that would not; for upon that point the agreement is as loose as possible. There is no passage in it *eo intuitu;* not that sort of passage in *Gregson* v. *Riddle*. The clause as to liberty to resell, &c. is

(a) *Ante*, vol. iv. 686. See also *The Marquis of Hertford* v. *Boore*, and *Guest* v. *Homfray*, *ante*, vol. v. 719 818.
(b) Statute 29 *Ch.* 2. *c.* 3.

{(1) *Bullard* v. *Walker*, 3 Johns. Ca. 60. where the *English* cases are reviewed by Chancellor *Kent*. See also *Clason* v. *Bailey*, 14 Johns. Rep. 484,}

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not considered of much importance in this Court: but in this instance it is a clause against the vendee, having no corresponding clause against the vendor. That clause expresses little more than would be the legal effect, if that was not inserted. But it is enough to say upon that, the objection relied upon in the argument, that the plaintiff might have sold, after the two months were expired, admits of this answer; that
[276] it is assuming the whole question. If you make out, that he would have been at liberty to resell, that does not make out, that he lets the other off. But under the circumstances he would not have been at liberty to resell. The evidence clearly imports, that the defendant did not understand it to have bound them in that mutual respect, in which he seems in his letter to think it reasonable they should be bound. But I will construe it for the purpose of this case, as if it had mutually bound them; and that, if the title was not made out by the day, then the defendant should be at liberty to say, he was off; for, if that clause had been in this agreement, he might have waived the benefit of it; and it must have been made out, that his conduct did not occasion the non-fulfilling the agreement. Take it, that there was the mutual clause. The moment after the sale the auctioneer was no longer the agent of the plaintiff. He was his agent only to sell, not to deal with the terms, upon which a title was to be made. The defendant must show the auctioneer had acquired a character to bind the plaintiff in that respect. There is no evidence of that: on the contrary the defendant applies to the auctioneer as such agent; and he refuses to act as such; and refers him to the plaintiff. But he applies again to the auctioneer; and never to the plaintiff. One clause of this letter is very important; marking the knowledge of the title in the law-agent of the vendee; and that he was able in the first instance, the day after, to state the material objections; viz. the proceeding in Chancery and *Darby's* claim. That is distinct evidence, that the defendant did not then understand, that he had entered into an agreement, by force of which he thought he had a right to say, the time of two months was absolutely of the essence of the contract. Whether that was misunderstanding, or not, that was his understanding. By the last words he seems desirous of having an agreement, which would for the first time give a mutuality as to time.
[277] But he does not choose to give up the one, till he gets the other; reserving to himself the power to deal with the first agreement, as he thinks fit; though he may not get the stipulation he wishes. If the plaintiff acceded to that proposition, he would be bound. But what is the evidence, that he did? There is a good deal of reasoning in support of the argument, that *Phipps's* letter is, not merely a statement, that he would pay interest, but with regard to some circumstances that the contract was to be off: viz. the deposit money to be returned with interest, connected with the dissolution of the agreement; which might be either within or after the expiration of the two months; but, if the former, it ought to be shown to be

clearly the effect of something that passed subsequently, and was acceded to. The letter of *Phipps* in answer is no evidence of the facts stated in it. Does the defendant conceive the matter as resting on that letter, and consider it as an undertaking to the extent he proposed; or as completely settling that mutuality he desired; giving him a right to insist upon the time as the essence of the contract? No; for afterwards he goes again to *Phipps*, not an agent to bind the plaintiff for this purpose; and not being able to prove the date further than that it was between the 13th of *April* and the 5th of *June*. This proves, that the defendant by repeated inquiries, addressed to his solicitor, who knew a good deal of the title, was informed from time to time, that the abstract was not delivered. The proof is complete as to that. This is a complete waiver of any objection from the non-delivery of the abstract at the time the defendant proposed that *Phipps* should write that letter. Being told, *Phipps* would not write that letter, he does not write himself; or direct his solicitor to apply: but upon the 7th of *June* by his solicitors he receives the abstract: they knowing the history of the title and the estate; and stating the two grounds of objection the day after the contract took place. There was a note at the bottom of the [278] abstract; stating distinctly, that the plaintiff had only a title under an agreement; but that all necessary parties were ready to convey; and making a proposal for that purpose; which might or might not be completed within the time. The abstract was delivered on the 7th of *June*. No objection was made to receiving it. It was kept, till the time expired, without objection. Ought not the objection to have been made on the 7th? The plaintiff was bound till the 12th. He could not sell to another; and if the solicitor had returned the abstract upon the objection, the plaintiff was at liberty to say, he had undertaken to remove all objections, or to tender a conveyance; and he might have proceeded to prepare a conveyance; which under the circumstances was to be prepared by the defendant; and he might have tendered that conveyance: so as to have a right to an action, or to file a bill, as upon an agreement, which he had undertaken to make good within the time.

This case is not like *Lloyd* v. *Collett*, (a) in which the defendant immediately sent the abstract back, and would not look at it. What right had this defendant to read the abstract, if it came too late? He had either an intention to execute the contract, or a hope, that he had time to get through the abstract, in order to carry it into execution: but the evidence in this respect is totally silent; and it is clear upon the objections stated in the solicitor's depositions, that at some period or other he had gone into the abstract.

As to the other circumstances, stated by the defendant, his selling out stock, &c. there is no evidence whatsoever. As to

(a) 4 *Bro. C. C.* 469, *ante*, vol. iv. 689, in the note.

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his intention of making this place his residence, there is nothing in the contract, having the * least reference to that; and upon an intention, not disclosed in the contract or afterwards, as essential, this Court has never been in the habit of acting.

Under the circumstances therefore, whether the time is or is not an objection, founded upon the authorities the reports of this Court furnish, which I will not discuss, let the autho- [*279] rities upon that point turn the scale either for the defendant or the plaintiff, there is no authority, that has not some reference to the conduct of the party in the mean time; and upon the conduct this defendant has no right under the circumstances to say, this contract was not performed within the two months. There must therefore be a decree for a specific performance; and, as to all the rest, a reference to the Master to see whether a good title can be made. Where the party has not been able to make his title before the decree, it is always a question very important as to the costs, but not, whether he shall take the title or not. According to old cases it was sufficient, if the title was made by the time of the report. (a)

(a) See *Jenkins* v. *Hiles*, *ante*, vol. vi. 646.

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ROLLS. 1801. *December* 18. 1802. *July* 5, 6.

BROWN v. BIGG.

The produce of real estate sold under a power in a will passed by a residuary clause with the personal estate: the object being a conversion out and out: but part remaining unsold was held a resulting trust for the heir at law. (1)

Under words importing a tenancy in common, though combined with words of survivorship, the interests vested at the death of the testator; and therefore vested in one of the residuary legatees, who died between the death of the testator and the death of the person entitled for life. (2)

JOHN BIGG, by his will, dated the 19th of *December*, 1793, gave and devised unto his wife *Ann Bigg*, all his freehold and copyhold estates, which he should die possessed of, in the parish of *Glemsford* in the county of * *Suffolk*, subject as therein mentioned; to have and enjoy said estates for and during the term of her natural life; with liberty to cut timber, as therein mentioned; and after the death of his wife he gave and devised said estates to his godson *John Bigg*, son of *John Bigg*, his late nephew, then deceased, by *Sarah* his wife, and to the heirs of his body lawfully begotten, or to the guardians of said *John*: should the wife of the testator die before said *John Bigg* should attain twenty-one years; and he declared, that should his said godson die, before he came to twenty-one years, or, before he should be legally married, and have no issue from a legal marriage, then he left such estates and the rents and profits thereof, that should have grown and arisen from the same, from the death of his said wife, to *Benjamin Tweed Bigg*, brother of said *John Bigg*, his godson, or in case of his death before twenty-one years or legal marriage without issue, then to his two sisters jointly,

{(1) See the note to *Chitty* v. *Parker*, *ante*, vol. ii. p. 270.}
{(2) See the note (2) to *Maberly* v. *Strode*, *ante*, vol. iii. p. 450.}

daughters of the testator's nephew *John Bigg* deceased by his wife *Sarah*, and their heirs for ever; to be managed by their guardians, till they were of twenty-one years respectively, or should be legally married; and the testator, besides the said *Glemsford* estates, gave to his wife during her natural life the yearly interest or produce of all stock his property in the 3 *per cent.* joint stock of annuities and reduced annuities, or by what other names they are called or usually distinguished: provided, that if the said *Ann* should marry again, then she would be entitled to one moiety only of the yearly interest or produce of said monies or stocks: the other moiety thereof to go and be applied to and to the use of the testator's nephews and nieces after mentioned in manner and proportions as therein expressed. He then ordered and empowered his said wife, (in case she chose so to do,) with the advice of *William Roberts* to sell all his *Gransden* estates, (stating, that she will probably not choose to live there,) with the crop in the ground [281] or barns, and all stock, furniture, chattels, and effects, with all convenient speed; and the money arising from such sale to be placed out on security; the yearly interest of which, as well as the interest due to the said testator on notes, bonds, mortgages, or otherwise, (except what was in the public funds,) he also gave and devised unto his said wife, under the like restrictions as before in case of a second marriage; and the testator after giving several legacies, and among them some specific articles of plate to *John Bigg*, did thereby after the decease of his said wife without issue by him leave the whole of his personal estate principal and interest of every kind both on public and private security before undisposed of to his several nephews and nieces after named: viz. *Elizabeth Bigg*, *Bateman Bigg*, *Sophia Bigg*, and the four children of his said nephew *John Bigg*, late of *Glemsford* in *Suffolk*, by *Sarah*, his wife; to be divided amongst them and the survivors of them, share and share alike; and he appointed his said wife *Ann Bigg* sole executrix.

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The testator died on the 13th of *February*, 1795. His widow died on the 13th of *July*, 1798, without issue by him and not having married again.

The bill was filed by the executors and legatees of the testator's widow *Ann Bigg;* praying the necessary accounts of *John Bigg's* personal estate, debts, &c.; and that the rights of the several persons entitled to his estate and effects now remaining unadministered may be ascertained, &c.

By the decree, made on the 22nd of *November*, 1799, the necessary accounts and inquiries were directed. Upon the Master's report, it appeared, that the whole of the copyhold estate, except a very small part, was surrendered to the use [282] of the will; and that some part of the *Gransden* estate remained unsold. *John Bigg* of *Glemsford*, the testator's nephew, who died on the 27th of *March*, 1793, had by *Sarah* his wife four children, *John Bigg*, *Constantia Ann Bigg*, *Elizabeth Bigg*, and *Benjamin Tweed Bigg;* all living at the date of the

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will and the death of the testator, and now living. *Elizabeth Bigg*, daughter of *Joseph Bigg* and *Constance* his wife, one of the residuary legatees, survived the testator; but died in the life of his widow on the 11th of *March*, 1796.

The questions were; First, upon the claim of the heir at law *John Bigg* to that part of the *Gransden* estate, that was not sold, and also to the money produced by the sale, as not being disposed of after the death of the wife; the other residuary legatees insisting, that the residue of the estate should be sold; and the produce of the whole should go as the personal estate: Secondly, whether any interest vested in *Elizabeth Bigg:* the other residuary legatees claiming the whole; as being the survivors at the death of the testator's widow.

Mr. Richards, and Mr. Bell, for the infant Heir at Law, John Bigg, also one of the residuary Legatees.—This estate is not directed to be turned into money out and out; but is kept distinct from the personal estate: the object of the testator being to give his wife an opportunity of living there. If she had made that choice, or, if *Roberts* had disapproved the sale, it would have descended as real estate. An option is given, not only to her, but to another. But, even if a positive direction was given to turn this into money, still not being disposed of it belongs to the heir. In *Saunders* v. *Kinsey*, Sir *Charles Saunders* created a trust of property to be laid out in land with consent of *Mrs. Saunders*. The decree directed it
[283] to be laid out: but no consent had been given. Upon a rehearing it was held, that in that respect the decree was wrong; that it continued to be money; and was to be applied as money, without being turned into land. The principle, upon which this is put in the celebrated argument of Lord *Eldon* in *Ackroyd* v. *Smithson*, (a) which prevailed with Lord *Thurlow*, whose first opinion was strongly in favour of the next of kin, is, not only, that there must be an intention, that the heir shall not take: but that some other person, who is to take, must be pointed out. Even express words, merely taking from the heir, will not do. The law casting it upon him, though the devisor may give it to another person, he cannot control the law by taking it from the heir, and leaving it to be seized by way of occupancy: *Collins* v. *Wakeman*, (b) and other cases there referred to. *Robinson* v. *Taylor*. (c)

Upon the next question, there are only two periods, to which the word "*survivor*" can apply: the death of the testator or the death of his wife without issue. The death of the testator is never taken as the period, except, where there is no other time, to which it can possibly apply. It may be contended, that there is no gift till the distribution; as in *Brograve* v. *Winder*. (d)

Mr. Grimwood, and Mr. Roupell, for the other surviving residuary Legatees.—This direction to sell the *Gransden* estate is

(a) 1 *Bro. C. C.* 503.
(b) *Ante*, vol. ii. 683.
(c) 3 *Bro. C. C.* 589, *ante*, vol. i. 44.
(d) *Ante*, vol. ii. 634.

imperative; and has the effect of converting it out and out. The words "*empower*" or "*request*" would have that effect. But upon the emphatical word "*order*" there can be no doubt, the intention of the testator was not to give an option; assigning his reasons for giving the * positive direction for the conversion. The expression as to *Roberts's* advice does not import a condition. The word "*empowered*" imports only, that she was to have the necessary powers of making conveyances to purchasers, giving acquittances for the money, and doing all other necessary acts, to carry that order into effect. She has no option to sell a part only; but is bound to sell the whole. The money arising from the sale is to be placed out on security; the interest of which, with the interest of other securities he disposes of; plainly showing, that it is to be personal property; and incorporating it with his other personal estate. Then the whole property so converted is disposed of. The authorities fortify this construction. *Mallabar* v. *Mallabar*.(a) *Durour* v. *Motteaux*.(b) *Fletcher* v. *Ashburner*; (c) and *Ogle* v. *Cook*, (d) a very strong case. The distinction upon these authorities is, that, where the property is to be converted out and out, as it is expressed, it must be considered converted for all purposes: but when the trust is to sell for particular purposes, if any of those purposes fail, the heir shall take what is lapsed: but then, as was determined in *Hewitt* v. *Wright*(e) particularly, he takes it as personal estate; which shows, the conversion is complete.

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Upon the other question they concurred with the heir at law, that the interests of the residue were not vested till the death of the widow.

Mr. Raynsford, for the residuary Legatees, and the Executor of Elizabeth Bigg; who survived the testator; but died in the life of his widow.

This was a reversionary interest, vested at the death of the testator; and the enjoyment postponed only to give the widow the use of the fund for her life. Upon *Monkhouse* v. *Holme*, (a) *The Attorney-General* v. *Crispin*, (b) and *Devisme* v. *Mello*, (c) it would be clearly a vested interest, if the words of survivorship were not added: but that must be taken to refer to the death of the testator; *Roebuck* v. *Dean*, (d) *Maberly* v. *Strode*. (e) [285]

Upon the other question they concurred with the other residuary legatees against the heir.

Mr. Richards, in Reply.—Upon the first point, an heir at law is not to be disinherited, either wholly or partially, but by direct words or clear intention. Whatever portion of the real estate is undisposed of belongs to the heir. *Ackroyd* v.

(a) For 79. (b) 1 *Ves.* 320. (c) 1 *Bro. C. C.* 497.
(d) Stated 1 *Bro. C. C.* 501. 513, *ante*, vol. ii. 686. (e) 1 *Bro. C. C.* 86.
(a) p. 285. 1 *Bro. C. C.* 298. (b) 1 *Bro. C. C.* 386.
(c) 1 *Bro. C. C.* 537. (d) *Ante*, vol. ii. 265. 4 *Bro. C. C.* 403.
(e) *Ante*, vol. iii. 450. In that case, and *Russel* v. *Long*, *ante*, vol. iv. 551, other cases on this subject are referred to.

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Smithson was decided upon a great number of cases, particularly *Digby* v. *Legard*. (*f*) The true question is, whether this is made personal estate at all events; and, if so, whether it is disposed of in all events; which is also necessary, to defeat the title of the heir. It was not in all events to be personal estate; for if his wife had died in his life, it could not then have been sold. So, if she had not chosen to sell it; for certainly she has an option. In the event of a sale he has not given the produce after the death of his wife to any one. Then, whether in the shape of money or land, if it is part of the real estate undisposed of, it goes to the heir. In *Ackroyd* v. *Smithson* and the other cases the real estate was to be turned into money to
[286] answer the exigencies of the will. In *Mallabar* v *Mallabar* the subject was beyond all doubt the produce of the real estate; and the construction was, that by personal estate the testator meant the produce of his real estate, not as being made personal estate by the sale, but as being considered so by him. The principle collected in Lord *Eldon's* argument in *Ackroyd* v. *Smithson*, and adopted by Lord *Thurlow* upon consideration of all the cases, is, that, whenever any portion of the real estate is left undisposed of, it must belong to the heir. This testator in the directions for laying out this money on security and as to the interest keeps the two funds distinct; and does not blend them. The single question is, whether by the whole of his personal estate he means the produce of the real estate; if not, it is undisposed of after the death of the widow; and then must go to the heir: the conversion alone without a disposition not being sufficient to defeat his right.

As to the other question, every case of this kind must depend upon its own circumstances. The testator was not providing for his nephews and nieces in all events, but upon a contingency, which might have deprived them of it for ever: viz. the event of the death of his wife, leaving issue by him. The time of distribution then is the time to look for the person to take; and that is the more convenient interpretation. This is not a provision for children.

The Master of the Rolls during the argument observed, that the general leaning of the Court is against construing the words of survivorship to relate to the death of the testator; if any other period can be fixed upon: the testator generally supposing, the legatee will survive him. If he intended his wife to have the whole for life, the probable conclusion was, that he meant the time of division.

[287] Upon the other question the Court observed, that the case of lapse could admit of no doubt.

July 5, 6. (*a*) The decree declared, that *John Bigg*, the heir at law

(*f*) In *Mr. Cox's* note to *Cruse* v. *Barley*, 3 *P. Will.* 20.

(*a*) The Reporter was absent, when the judgment in this cause was pronounced: but the decree is taken from the Register's Book.

of the testator, is entitled to so much of the *Gransden* estate as remains unsold; and that the money produced by the sale of such part as has been sold, is to be considered as part of the personal estate of the testator; and that the representatives of *Elizabeth Bigg* are entitled to her share of the residue of the testator's personal estate; and the trust of the funds was declared in seven shares accordingly. (*b*)

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(*b*) *Bayley* v. *Bishop*, *Post*, {vol. ix. p. 6.}

FENTON *v.* HUGHES.

July 7.

Bill for discovery, in aid of an action: demurrer by a mere witness allowed; though the discovery would be more effectual than the examination at law, and notwithstanding a charge of interest in the defendant; as to which he may be called by the plaintiff, waiving the objection, and if called against him may be examined upon the *voir dire*.

THE bill stated, that the defendant *Bate* had formed a connexion with *Lancellot* for the purpose of discounting bills, giving part money and part goods, and the purchase of annuities; and *Lancellot* introduced *Bate* to the plaintiff, as a person who wanted to purchase goods; proposing payment by bills. The bill then stated a transaction of that nature, and a subsequent transaction; in which *Lancellot* gave a bill for 500*l.* to the plaintiff in consideration of bills and notes, and cloth; that an action was commenced by the other defendant *Mary Hughes*, *Qui tam*, &c. to recover penalties from the plaintiff for an unlawful and usurious contract; charging, that the action was brought at the instance of the defendant *Bate*, and circumstances showing intimacy between the defendants in support of that. The prayer of the bill was for a discovery from the defendants; and that the plaintiff may have the benefit of * such discovery at the trial of the said action so commenced in the name of the defendant *Hughes*; and that the defendants may be restrained from proceeding in the action so commenced in the name of the defendant *Hughes*, and from commencing any other action against the plaintiff touching the said matters.

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The defendant *Bate* demurred; for cause, that the plaintiff had not shown any right to call upon the defendant in a Court of Equity for a discovery of the said matters; and that it appears of the plaintiff's own showing, that the defendant *Bate* may be examined as a witness.

Mr. Owen, *in support of the Demurrer.*

Mr. Romilly, *and Mr. W. Agar*, *for the Plaintiff.*

July 7.

To a bill for relief a mere witness cannot be a defendant; except in the case of a secretary, &c. of a corporation.

The Lord CHANCELLOR.—This demurrer must be allowed. The demurrer is put in upon the principle, that *Bate* ought not to be a defendant; being a mere witness; and it is admitted, that it is impossible to file a bill against a person who is a mere witness, if the object of the bill is to have relief in Equity. That is established by a great variety of authorities; and the contradictory opinions of Lord *Thurlow* and Lord

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Kenyon upon the case of *Cookson* v. *Ellison*, (a) both admit that principle, with the exception of one or two classes of cases. (1) Lord *Thurlow* in that case supported the exceptions to the answer of a person, who was a mere witness, upon the ground, that having answered a part he was bound to answer
[289] throughout. Lord *Kenyon* on a subsequent case expressed a different opinion: viz. that if it appeared at any time, that he was a mere witness, having answered a part he had answered more than sufficient; and should not be held to answer throughout. But the principle of both decisions is the same; that to a bill for relief a mere witness should not be made a defendant. The cases of secretaries and book-keepers to Corporations proceed upon another ground, now sanctioned by practice, so that it is impossible to unsettle it. But the principle is very singular. It originated with Lord *Talbot*; (a) who reasoned thus upon it; that you cannot have a satisfactory answer from a Corporation; therefore you make the secretary a party; and get from him the discovery you cannot be sure of having from them; and it is added, that the answer of the secretary may enable you to get better information. The first of those principles is extremely questionable; if it were now to be considered for the first time; and, as to the latter, it is very singular to make a person a defendant, in order to enable yourself to deal better and with more success with those, whom you have a right to put upon the record. But this practice has so universally obtained without objection, that it must be considered established.

There have been cases of agents to sell, auctioneers, &c. made defendants without objection. Whether that arose originally from some interest in them as holding deposits, that would frequently entitle the plaintiff to relief against them, I do not know: but I cannot deny, that such persons have been made defendants, where it would be very difficult to say, any relief was to be prayed against them at the hearing. But those cases are upon bills for relief. In *Plummer* v. *May* (b) the object of the bill seems to have been to set aside a will for
[290] fraud; and one of the subscribing witnesses was made a defendant. There was a charge, that he had an interest; and from the last passage of the judgment you may collect, that it was not a mere charge of interest, but of such species of interest, that at the hearing there might have been a decree for an account against him. As to that case, I only say, unless it was upon a bill for relief, I do not know how to understand it.

This is a mere bill for discovery; stating the interest of *Bate* in the action brought by the defendant *Mary Hughes*;

(a) 2 *Bro. C. C.* 252. See *Jerrard* v. *Saunders*, *ante*, vol. ii. 454, and the references.
(a) p. 289. *Wych* v. *Meal*, 3 *P. Will* 310. (b) 1 *Ves* 426.

{(1) See the remarks of Chancellor *Kent* upon the modern cases upon this point, 1 Johns. Cha. Rep. 73, 74.}

and seeking as against him those discoveries, to which I would for the present without prejudice suppose the plaintiff entitled as against her, a discovery to enable him to defeat her action; and then the question is, whether this sort of charge of interest in this bill, a mere bill for a discovery, and an injunction to stay trial till the discovery, makes *Bate* any thing but a witness. It was contended, 1st, that he is a mere witness: 2dly, that he may be called at law, so as to make it impossible, that he could do any harm or any good, viz. by first stating his interest, and so discrediting him before the examination. As to that, at the *Old Bailey*, the Judges would not permit that to be done, even upon the examination in reply; holding, that you give him credit by calling him; and they would not permit you to breathe a suspicion against him, if you did not like his cross-examination. That, I was informed, had been settled upon conference by all the Judges. I must therefore consider *Bate*, if he is a witness, as a witness having credit given him by those who call him.

A party having called a witness cannot discredit him.

The question however is, whether he can be examined at law for the plaintiff in equity with the same benefit, that would result from a discovery here. If he can, as no relief is to be given, it would introduce a new class of cases to permit a bill [291] for discovery to be filed against a party so purely a witness. It is impossible, that he can be examined at law against the plaintiff, if the bill is true; for he may be examined upon the *voir dire;* and then his interest will come out. It is impossible also for the plaintiff at law to prevent his being examined for the defendant; for he may waive the objection of interest. This defendant therefore may, with some exceptions, be examined at law by parol as effectually as here by writing. The exceptions are these. First, I cannot satisfy myself that a *subpœna duces tecam*, is as operative for the production of books, papers, and writings, as a *subpœna* upon a bill in this Court. Secondly, in such a transaction as this, of considerable importance, the fact of usury being to be made out by proof of the nature and quality of the cloth, showing, that the sale was colourable, inspection may be material. But then the point is, whether upon the distinctions arising out of such circumstances the rule not to make a mere witness a defendant, especially upon a bill for discovery, has ever been shaken. I can find no such authority. This demurrer therefore must be allowed. I will not say, as it is not necessary to determine, whether a bill for relief might not be filed, upon the ground, that the examination at law must be of necessity defective for bringing forward all, that conscience requires; and that what is withheld is withheld by a person having an interest in the question. But I cannot find an authority, that a person can be made a party to a bill for discovery merely, to aid the plaintiff in equity as defendant at law, upon the circumstance, that the production and inspection of goods may be better compelled here.

Demurrer allowed.

1802.



July 7.

FAUQUIER v. TYNTE.

The Court refused to permit depositions in the French language to be delivered out for the purpose of being translated.

A MOTION was made, that the depositions in this cause, taken in the French language, might be delivered out to a notary public, to be appointed by the Court, for the purpose of being translated.

Mr. Wyatt, in support of the Motion, urged the necessity of the case. The depositions being so voluminous, that the notary could not attend at the office without giving up all his other business. He admitted, no authority could be found; but compared it to the case, where an order has been made for delivering out an original will.

Though the Court orders an original will to be delivered out for a special purpose, as to the jurisdiction, *Query*.

Lord CHANCELLOR.—I cannot order a record out of the possession of the officer of the Court. Though in the case of a will I have followed what my predecessors have done, I never could answer the question, what I could do to the officer, if he refused to obey the order. (a)

(a) See *Hodson* v. ——, *Ford* v. ——, *ante*, vol. vi. 135. 802. *Williams* v. *Floyer*, *Amb.* 343 *Lake* v. *Causfield*, 3 *Bro. C. C.* 263. *Morse* v. *Roach*, 1 *Dick.* 65. *Pierce* v. *Walker*, 2 *Dick.* 485.

July 7.

WALLIS v. THOMAS.

An omission in a decree, if perfectly of course, supplied on motion. In this instance the common direction to examine all parties upon interrogatories being omitted, an order was made, on motion, that the Master should be at liberty to examine, &c.

A MOTION was made, that the usual direction for the parties to be examined upon interrogatories, as the Master shall think fit, may be added to the decree, though passed and entered. No notice had been given of this motion.

* *Mr. Hart, in support of the Motion*, said, it had been done, where it was quite of course.

The Lord CHANCELLOR said, where the amendment is that, which would have been put in of course, nothing more than what is necessary for the prosecution of the point of the decree and quite of course, there was no harm in it.

Mr. Cox, (amicus curiæ,) said, it had been done by Lord *Alvanley* in *Smith* v. *Draper*, and by the present Master of the Rolls in another case.

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The Lord CHANCELLOR however said, notice must be given; and the motion having stood over for that purpose, his Lordship finally made an order, that the Master be at liberty to examine the parties upon interrogatories, instead of varying the decree. (a)

(a) See the next case, and *Eyles* v. *Ward*. *Yow* v. *Townshend*, 1 *Dick.* 58, 59.

1802.



PICKARD v. MATTHESON.

Nov. 13.

An omission in a decree, if perfectly of course, supplied on motion: viz. in the usual decree upon a creditor's bill against executors the direction for an account of the personal estate. (1)

A MOTION was made, that the usual direction to take an account of the personal estate may be inserted in the decree. The bill was filed by creditors against executors for an account: and the defendants submitted to account in the usual way. The usual decree was made at the Rolls for an account of what was due to the plaintiffs and all other creditors, &c. with a direction to compute interest upon such debts as carry interest, &c.; and it was ordered, that the defendants should transfer to the Accountant-General 1000*l*. Bank Annuities admitted to be standing in their names; and further directions were reserved: the decree omitting the direction for an account of the personal estate.

Mr. Hart, in support of the Motion, said, that was a mere clerical error; and the object of the motion was to save the expense of a rehearing. [294]

Lord CHANCELLOR.—This is so purely of course, that upon that ground I may interfere. If there was a shadow of doubt, you ought to go to the Master of the Rolls, who made the decree. But it is so very clear, that you may take the order. *(a)*

(a) See the preceding case, and the references.

SCAWEN v. BLUNT.

ROLLS. *July* 9, 12.

A. tenant for life, in case she should so long continue unmarried; in case of her marriage to her in fee; in case of her decease unmarried, to her sister *B.* in fee. *A.* and *B.* and the husband of *B.* joined in a sale by fine. The purchase money was laid out in the funds in the names of trustees without any declaration of trust or agreement as to the application: nor was any notice of this fund taken in the wills of *B.* and her husband. *B.* being the survivor, made a general disposition of all her personal estate in favour of *A. A.*, though still unmarried, held absolutely entitled to the stock.

SAMUEL POWELL, by his will, dated the 23d of *November*, 1778, devised to his wife *Sarah Powell*, his messuage, farm, and lands, and all other his estate at *Lee*, in *Surrey*, with the appurtenances; to hold the same to her and her assigns for and during the term of her natural life; and from and immediately after her decease, he gave and devised the same premises to his great niece *Louisa Scawen* for and during the term of her natural life, in case she should so long continue unmarried; but in case of her marriage, then he gave and devised the said messuages, &c. to her, her heirs and assigns for ever: but in case of her decease unmarried, then upon her decease he gave and devised the same to her sister *Mrs. Winifred Blunt*, her heirs and assigns for ever.

The testator died soon after the execution of his will. *Sarah Powell* took possession; and continued in possession * till her death; then *Louisa Scawen* took possession. In 1788

{(1) *Lawrence* v. *Cornell et al.* 4 Johns. Cha. Rep. 546.}

1802. SCAWEN v. BLUNT.

Louisa Scawen and *Winifred Blunt* came to an agreement to sell the estate; and accordingly by indentures of lease and release, dated the 1st of *June*, 1788, and a fine, *Louisa Scawen* and *Samuel Blunt*, the husband of *Winifred Blunt*, and *Winifred Blunt*, conveyed the estate, and their several rights and interests therein, to *John Arnold* for the sum of 2100*l.* There was no covenant in the indentures respecting the application of the purchase money, or any deed of trust made in relation to it, or any notice taken, or claim set up by *Blunt* or his wife.

Samuel Blunt died on the 1st of *January*, 1800, having by his will given to his wife *Winifred* 1000*l.*; and appointed *Henry Blunt* and *Winifred Blunt* his executor and executrix; but did not take notice of the Bank Annuities. *Henry Blunt* alone proved the will. *Winifred Blunt* claimed her legacy of 1000*l.* She never did any act with respect to the Bank Annuities: but she died on the 2d of *February*, 1800; having by her will, dated the 31st of *January*, 1800, bequeathed to *Miss Scawen* all her personal estate, money, and effects, of all kinds whatsoever, of which she should die possessed, and all money due to her, or that should become due; and she appointed *Henry Blunt* her executor.

The bill was filed by *Louisa Scawen*, who was still unmarried, against *Henry Blunt* and the representative of the surviving trustee, stating these circumstances; and that upon the execution of the deeds *Arnold* paid the purchase money 2100*l.* to *Louisa Scawen*; who immediately placed it in the hands of *Martin York* and *William Birch*, the trustees and agents for the management of her affairs; who shortly after repaid 100*l.* part thereof, to *Louisa Scawen*; and invested the remainder in the
[296] purchase of 2649*l.* 3 *per cent.* Consolidated Bank Annuities in their names; and paid the dividends to the plaintiff until the death of the survivor of them. The bill prayed, that the plaintiff may be declared absolutely entitled to the Bank Annuities and a transfer.

The defendant *Blunt* by his answer stated, that he did not know whether the money was paid to or by the plaintiff in the presence of *Samuel Blunt* and his wife, or either of them. He admitted, that *Samuel Blunt* did no act in respect of the premises or the consideration for the sale or the Annuities, other than as above mentioned at the time of the sale; and he submitted, whether under the circumstances the interest in the Annuities in the event of the plaintiff's death, unmarried, passed under the will of *Samuel Blunt*, or under that of *Winifred Blunt*.

Mr. Richards, and Mr. Heald, for the Plaintiff.—The plaintiff claims this fund, even if she should not marry, either as having become her property by the acts of *Mr.* and *Mrs. Blunt*, or under the will of *Mrs. Blunt*, having survived her husband; who never reduced it into possession. These parties aware of their rights, concurred in a sale; and permitted the purchase money to be paid to this plaintiff solely. They do not call for any declaration of trust. The circumstance, that

Mr. Blunt allowed the money to be laid out in stock by the agents of the plaintiff, without any interference by him, is inconsistent with an intention of reserving any right to himself. That is evidence of his allowing the plaintiff to keep it as her own; and no person claiming under him can contradict that. His conduct precludes his representative from claiming this money. There is a material distinction between the cases of the husband receiving the money, and his permitting it to be paid to trustees. In the latter case he could not get it without making a provision for his wife. But in this instance there was no title to receive it. It was incumbent upon him then to obtain a declaration of trust, particularly upon property, that was subject to contingency. It is fair to presume, that he meant to abandon his rights.

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Upon the other point, this personal fund, as it turned out to be, survived to *Mrs. Blunt;* having never been reduced into possession by her husband. The only difficulty arises from the nature of the subject, of which this fund is the produce, real estate, under these limitations. The husband could not have done any act to affect it after his death. It changed its nature; and became money due in respect of the estate of the wife. Then it is due to the husband as a chose in action, belonging to him in right of his wife; and then the rule of law applies. The effect is leaving the property still as if it had been originally money. The interest of the wife is not gone by the fine levied, without a declaration to that effect; as in the case, where a woman levied a fine for the purpose of granting a building lease; and the houses were burnt down. The husband may join his wife in an action; and if he does, and dies before execution, the wife alone may sue out a *scire facias*.

Mr. Kenrick, for the Defendant.—The only decree, that can be made at present, is for a transfer of the fund, with liberty to apply either upon the death or marriage of the plaintiff. Whether this property passed under the will of *Samuel Blunt*, or that of his wife, as there is no admission of assets of either, no other decree can be made, till some account is taken, to ascertain, whether this money is wanted to pay debts. As to the abandonment suggested, the trustees were conusant of the rights of all the parties; and were friends of the family; which is evidence, that there was no intention of abandonment. As to the claim under *Mrs. Blunt*, as the survivor, this is no chose in action. After the fine levied all the interest passed out of *Mr.* and *Mrs. Blunt.* There was a new consideration; and an implied promise arose to pay to the person, who in the course of events should be entitled. That implied promise could not arise to the married woman: *Abbot* v. *Blofield,* (a) *Rose* v. *Bowler,* (b) *Doe* v. *Polgrean.* (c) Where a new consideration arises by law in respect of any property or earnings of the wife, it arises solely to the husband: an ac-

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(a) Cro. Jam. 644. (b) 1 Hen. Black. 108. (c) 1 Hen. Black. 535.

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tion for such money must be in the name of the husband alone; and if the wife is joined, it is a misjoinder; if the consideration is not wholly the wife's: *Brashford* v. *Smith*, (d) *Fountain* v. *Smith*, (e) *Holmes* v. *Wood*. (f) In this case the husband had a contingent interest in the estate; with which he parted; as his wife parted with the fee. He might have brought an action solely in his own name for the consideration; which arose solely to the husband; and the wife had nothing to do with it. The wife parts with the land by fine; the only act, by which she could part with it; and the consideration in law belongs and arises to the husband. If, when privately examined, she does not stipulate, as she might, that the consideration should arise to her, it arises in law to her husband. If it stands as at law, and there are no circumstances to distinguish it, it survives to the husband, and not to the wife. The anonymous case cited, (g) in *Llinaston* v. *Lloyd*, (h) is exactly this case; that, where the husband and wife sell lands of the wife, and with the money purchase other lands, that is a jointure within the statute, 11 *Hen.* VII.; [299] the money being a chattel vested in the husband; of which he might dispose, as he pleased. This fund therefore belongs to the executor of the husband, and did not pass by the will of *Mrs. Blunt*.

Mr. Richards, in Reply.—The case last cited does not apply. If the money had been paid to the husband, it would have been chattels belonging to him in his own right. But he never actually or by implication received, unless payment to the plaintiff can be considered payment to him, as payment to his agent would have been, a payment to his use. This case is new in the circumstances: the money being the property of the wife, and changing its quality by the act of the husband, it still is money arising from her estate; the property of the wife not reduced into possession, unless payment to the plaintiff can be considered as payment to the husband, as it cannot; for to a certain extent she has beyond all doubt a right to receive it. It was paid to her agents by the purchaser, subject to the trusts belonging to it. The husband could not have brought an action. It was liable to her action only. He had some interest, but very remote; which could not at all affect the right of the wife.

July 12. *The Master of the Rolls*.—If it was necessary to decide this cause upon the question as to an implied gift, or abandonment, by *Mr. Blunt*, of whatever interest he might have had, some inquiry would be necessary as to the circumstances of the transaction. But it is not necessary for the plaintiff to resort to that ground of claim. All the parties interested in the estate concurred in a sale; but without any declaration, or

(d) *Cro. Jam.* 77. (e) 2 *Sid.* 128. (f) Cited 2 *Wils.* 424.
(g) *Palmer*, 217. (h) *Palmer*, 213.

agreement, as to the manner in which the produce should be divided, employed, or secured. The consequence is, there resulted to all the same interest in the produce of the real estate, that they had in the real estate * itself. The plaintiff, if she had married, would have been entitled to the whole; because in that event she would have had the fee simple of the estate. If she did not marry, she would be entitled to the interest for her life; and upon her death without being married it would go to her sister *Mrs. Blunt*. All they have done is to convert the land into money; leaving untouched the disposition by the will; to which we must still resort, to ascertain the interests of the parties. This brings it to the same point, as if he had originally given money in the same manner as he has given the land. Except by some special agreement no one could claim one shilling; for the only present right is that of the plaintiff; and that only to the interest, not to any part of the money itself. *Mr. Blunt* could not have said, part of the money belonged to his wife, and consequently to him in her right. If there was any part of the price, which she could immediately have claimed, it would have immediately become his, and would have vested in him; and whatever became of it, he might have claimed it, and have followed it as his own. But the utmost he or any of the parties could insist upon against each other was, that it should be laid out upon the trusts of the will. Now, being paid to trustees without any declaration or agreement, the implied or resulting trusts must be those of the will. Then it is in nature of a chose in action. The husband has done nothing to reduce it into possession. Therefore it survived to the wife; and though a contingent interest, it was devisable, &c. and passed by the will. (a) The plaintiff therefore unites in herself every possible right to the money: but a transfer cannot be directed till some inquiry as to the debts, funeral expenses, &c. of *Mrs. Blunt*. Direct that inquiry; and reserve further directions. (b)

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Contingent interest devisable, &c.

(a) *Perry* v. *Phelips*, *ante*, vol. i. 251, {and notes.}
(b) *Blount* v. *Bestland*, *ante*, vol. v. 513.

Ex parte DAY.

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July 12, 13.

Bond upon a loan of stock, to secure a re-transfer and the dividends in the mean time. The obligor becoming a bankrupt after the day mentioned in the condition, proof was admitted for the amount of the dividends due before the bankruptcy, and the value of the stock at the date of the commission, by analogy to the case of annuities.

JOSEPH DAY lent and transferred to *John Elvy* the sum of 500*l.* 5 *per cent.* Navy Annuities; and *Elvy*, in order to secure the replacing and retransfer of the said annuities to *Day* by a bond, dated the 19th of *April*, 1798, became bound to *Day* in 1000*l.* conditioned, that if *Elvy*, his executors, &c. should on or before the 25th of *March* next, transfer to *Day*, his executors, &c. 500*l.* 5 *per cent.* Navy Annuities, and like-

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wise should answer, pay, and make good, to *Day*, his executors, &c. all dividends, interest, and produce, which in the mean time should or might be paid, made, or received, on account of the sum so lent by *Day;* or which he, his executors, &c. could have received, or would have been entitled to, in case the stock had remained as his property, the obligation should be void.

The stock was not replaced in the life of *Day*, nor since his death. *Elvy* became a bankrupt. The executors of *Day* attempted to prove as a debt under the commission so much as was equivalent to, and would have replaced, said 500*l.* Navy Annuities at the date of the Commission, together with so much as was due for dividends accrued thereon: but the assignees objecting to their proving any larger sum than was equivalent to the Navy Annuities on the day mentioned in the condition of the bond, the commissioners only permitted a claim to be entered; upon which the petition was presented; praying, that the petitioners may be admitted to prove such sum as will be equivalent to the said 500*l.* Navy Annuities at the date of the commission, together with such sum as may remain due to the estate of *Day* for the dividends, which had accrued thereon.

Mr. Romilly, in support of the Petition.—Mr. Cox, for the Assignees.

July 13.

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* *The Lord* CHANCELLOR.—I have been furnished with a case before the Lords Commissioners *Ashhurst* and *Wilson* in 1792, *Ex parte Leach;* in which the order was to prove the value of the stock at the date of the order. That cannot be right, for that makes it depend upon the time at which the party chooses to apply. The date of the day, on which the bond becomes forfeited, is not right; for then the value of the stock at that time must be estimated; and I do not see, how proof can be admitted for the dividends in the intermediate time; for it must be a debt carrying or not carrying interest: it cannot be a debt carrying dividend. The proof as to annuities secured by bond affords the same principle. If there is a breach of the condition, and you take the value at that time, you cannot give proof of the arrears of the annuity, as such: but there also it must be a debt carrying or not carrying interest at that day. If the time, at which the party chooses to apply, is taken, suppose he does not apply, till dividends subsequent to the bankruptcy become payable, they could not be proved; for this reason, that the debt must be due at the time the commission issues: this distinction was acknowledged in the older law as to annuities; for formerly a man might insure the growing payments of an annuity, but not the arrears, which were a debt: the former being subject to this contingency; that if the life failed, the annuity would be gone; to which the arrears, that had become a debt, were not liable. But since *Edie* v. *Anderson*, before Lord *Kenyon*, you may insure arrears of annuity, or any other debt. Sup-

pose an annuity upon which there were no arrears: the annuity must be valued at the time of the commission. It will be said, that is for the benefit of the annuitant, if the annuity is for life; and that is true in general; though the state of health may make a great difference. 1802. Ex parte DAY.

Upon the whole, the best rule will be to permit the proof for such dividends as became due before the bankruptcy, as a debt, and the value of the stock at the day the commission issued. This is liable to some objection, I admit; but in a less degree than any other rule; and it is more analogous to what the Court would have done before any statute respecting bonds with penalties at law. In those cases the party would have been relieved against the penalty by making good the condition: viz. by paying past dividends and replacing the stock. A commission of bankruptcy is to some intents an execution. The penalty therefore is due at the time of the commission; and against that there would be relief by replacing the stock, and repaying the former dividends. Without interfering with proceedings in the Court of King's Bench, this rule must prevail in bankruptcy, to preserve the analogy to annuities. [303]

Ordered.

Ex parte EDMONSON. *July* 13.

Though a commission of bankruptcy cannot stand upon a concerted act of bankruptcy, it may be supported, if any other act of bankruptcy, not liable to that objection, has been committed; and the privity of the bankrupt is no objection: nor, that the object of the commission is to defeat an execution.

THE object of this petition was, that the petitioning creditor under a Commission of Bankruptcy should be ordered to pay the costs of the several applications made for the purpose of impeaching the commission: the petitioner having obtained a verdict against it. A great many contradictory affidavits were read.

The Lord CHANCELLOR upon the result of the affidavits dismissed the petition. His Lordship declared his opinion, first, that it is not a fraud to take out a Commission for the purpose of defeating an execution; and even though the affidavit of the petitioning creditor should recite that purpose: that being no more than he has a right to do; and better than that one creditor * should sweep away the whole by an execution; though undoubtedly he might do so; each being to do the best for himself. There was some difference of opinion upon this in the Court of Common Pleas; and Lord Chief Justice *Eyre* was of a contrary opinion.

Secondly, a commission of bankruptcy may be supported, notwithstanding the privity of the bankrupt, and that it is now settled, though formerly it was otherwise, that a commission cannot stand upon a concerted act of bankruptcy. But if any other act of bankruptcy has been committed, not liable to that objection, even that commission may be supported; as in a case of the bankruptcy of an agent of the Duke of *Portland* at *Newcastle*. [* 304]

1802.

July 14.

ROUGEMONT *v.* THE ROYAL EXCHANGE ASSURANCE COMPANY.

To obtain a commission to examine witnesses abroad it is not necessary to state the points, to which it is intended to examine, or the names of the witnesses.

MR. ROMILLY, for the Plaintiff, claiming under a policy of insurance, as upon an average loss, the cargo having been damaged in consequence of the ship being bulged upon the voyage, moved, upon affidavit, for a commission to examine witnesses at *Hamburgh*.

The Attorney-General, for the Defendants, opposed the motion; observing, that it was expressly denied, that the ship was bulged in the voyage; and suggesting, that they ought to name their witnesses, and the points to which they meant to examine.

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Mr. Romilly said, it was necessary to examine witnesses, at *Hamburgh* to the fact of the damage of the cargo; but upon such a motion, the subject arising abroad, an affidavit is not necessary: and it was determined in *Oldham* v. *Carleton*, (a) that it is not necessary to state the points to which the examination is intended.

The Lord CHANCELLOR made the order.

(a) 4 *Bro. C. C.* 88.

July 15.

HANSON *v.* GARDINER.

Injunction obtained on affidavits against cutting, and pasturing cattle, in a wood; the plaintiff praying the injunction as tenant in fee, or as Lord of the Manor enclosing under the Statute: the defendants denying the former title; and as to the latter claiming common of pasture and estovers; and stating, that after the enclosure sufficient common of pasture would not be left; the plaintiff having before the bill filed been nonsuited in an action of trespass; and entered into an agreement with some of the tenants. The injunction dissolved upon the answer. (1) Whether the original and new affidavits could be read in such a case, *Query*.

THE *Attorney-General, and Sir Thomas Turton, for the Plaintiff*, showed cause against dissolving the injunction upon the answer put in. The prayer of the bill was for an injunction against cutting down timber or wood in a wood or coppice, consisting of about 130 acres, within the Manor of *Bromley*, and depasturing cattle therein. The injunction was granted by the Master of the Rolls upon affidavits. The plaintiff represented himself as seised in fee of this wood and coppice; which were formerly enclosed; but that some time ago the enclosure was thrown down; and considerable damage done to him by the cattle of the commoners trespassing thereon. The defendants contended, that the plaintiff was not seised in fee. The plaintiff further insisted upon his right as Lord of the Manor under the Statute of *Merton*. (b) The defendants stated, that there are large patches of pasture within the wood; upon which they claimed as commoners a right of pasture;

(b) Stat. 20. *Hen.* III. c. 4.

{(1) See *Stevens* v. *Beekman et al.* 1 Johns. Cha. Rep. 318.}

and that after this enclosure there would not be sufficient common of pasture. They also claimed common of estovers; and denied, that the wood and coppice were ever enclosed. They stated various encroachments by *the plaintiff: that for some time they acquiesced: but finding his encroachments increase, they at length resisted; which produced an action of trespass by the plaintiff; which was tried at the Summer Assizes, 1801; and the plaintiff was nonsuited. He afterwards, having permitted the enjoyment for some time, gave notice, that he would enclose under the Statute *(a)* of *Geo.* II. The enclosure was ordered at the Sessions under an agreement with some of the commoners: but the defendants appealed; and that order was quashed.

1802. HANSON v. GARDINER. [*306]

The Attorney-General, and Sir Thomas Turton, pressed to have the injunction continued to the hearing, and to have two issues directed: first, to try the right of the defendants, as commoners; and secondly, whether supposing the wood enclosed, there would be sufficient common left for the tenants. They insisted, that the principle of the bill was not new: *Arthington* v. *Fawkes.(b) Weekes* v. *Slake.(c) Shakespear* v. *Peppin.(d)* In the last of those cases, Lord *Kenyon* read a manuscript note of Lord Chief Justice *Willes;* (1) laying down the broad proposition, that a man may enclose against common of pasture, notwithstanding common of estovers.

They also insisted, that they were entitled to maintain the injunction, not only by the affidavits originally filed, but also by fresh affidavits; citing *Robinson* v. *Lord Byron,(e) Isaac* v. *Humpage,(f)* and *Gibbs* v. *Cole.(g)*

Mr. Mansfield, and Mr. Pemberton, for the Defendants.—This bill is new. Such an injunction has not been granted in modern times. The cases in *Vernon*, as there stated, are extravagant; that the Lord making a new enclosure, and at once shutting out the commoners, shall have an injunction immediately, before the right is established at law. There must have been some ground; as multiplicity of suits, &c. The Statute of *Merton* and the Statute 29th *Geo.* II. both relate only to common of pasture. In *Robinson* v. *Lord Byron* either the Court was to interpose, or the mills were to be drowned: but except in cases of such extreme necessity affidavits are not to be admitted. So, in *Strathmore* v. *Bowes (a)* they were offered to show the nature and extent of the waste threatened. But affidavits cannot be read in such a case as this, to support the injunction against the answer. The case of *Isaac* v. *Humpage* stands upon a peculiar ground; though certainly that was a very gross case. [307]

Lord CHANCELLOR.—This bill for an injunction is not like a bill between lord and tenant, praying the establishment of

(a) Stat. 29 *Geo.* II. c. 36. (b) 2 *Vern* 356. (c) 2 *Vern.* 301. (d) 6 *Term Rep.* 741. (e) 1 *Bro. C. C.* 588. (f) 3 *Bro C. C.* 463, *ante*, vol. i.*427. (g) 3 *P. Will.* 254. See *Mr. Cox's* note.
(a) p. 307. 2 *Bro. C. C.* 88. *Mr. Cox's* note, 3 *P. Will.* 255.

{(1) *Fawcett* v. *Strickland*, Willes's Rep. 57.}

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rights, and an injunction till, or at, the hearing, as auxiliary to the rights: this bill not stating the relation between the plaintiff and the tenants; but simply praying an injunction. The law as to injunctions has changed very much; and lately they have been granted much more liberally than formerly they were. Formerly, when legal rights were set up to the extent, in which they are set up in this case, the Court were very tender in granting injunctions. (*b*) I remember, when in a case of trespass, unless it grew to a nuisance, an injunction would have been refused; and even in the case of waste, if by temporary acts, from time to time merely, the subject of an action, and not bringing along with it irreparable mis-
[308] chief, (*a*) Lord *Hardwicke* thought, it was granted only as following the relief. Lord *Thurlow* had great difficulty as to trespass. I have a note of a remarkable case, in which the name of one of the parties was *Flamang*. There was a demise of close *A.* to a tenant for life; the lessor being landlord of an adjoining close *B.* The tenant dug a mine in the former close. That was waste from the privity. But when we asked an injunction against his digging in the other close, though a continuation of the working in the former close, Lord *Thurlow* hesitated much; but did at last grant the injunction; first from the irreparable ruin of the property, as a mine; secondly, as it was a species of trade; and thirdly, upon the principle of this court enjoining on matter of trespass, where irreparable damage is the consequence. (*b*)

Lessee committed waste by opening a mine; and continued the work into other land of the lessor, not comprised in his lease. Injunction as to both.

This led to *Robinson* v. *Lord Byron* and the other cases; in which also this principle operated; that unless there was some jurisdiction to prevent it, there would be a great failure of justice in the country. The ground of that case was irreparable mischief; and irreparable mischief, that would have been done, before there could have been any trial at law as to the right claimed to let off the water. *Isaac* v. *Humpage* is a case upon its own particular circumstances; certainly not standing upon the notion of irreparable waste. Mr. Justice *Buller* put it upon fraud. It does not appear exactly how he applied that to the case: but it certainly is not at all connected with what is here stated. If this is to be considered upon trespass alone, an injunction would not be granted, merely because asked for, without stating distinctly, that it was upon trespass alone. If it is not to be so considered, then it is a bill brought
[309] by the Lord of the Manor; which must be taken to admit, either, that there are rights of common of pasture and estovers, or, that it may so turn out; insisting against those rights upon an enclosure made under the Statute of *Merton* or other authority. It is difficult to state, what he is to say as to common of estovers: this case stating, that he has a right to preclude them from ingress, &c.; denying therefore their right to estovers. After the cases cited from *Vernon* I am not disposed to

Injunction in the case of trespass to prevent irreparable mischief.

(*b*) See *Pillsworth* v. *Hopton*, *Davis* v. *Leo*, *ante*, vol. vi. 51. 784.
(*a*) p. 308 See *ante*, vol. vi. 701. 705, 706.
(*b*) *Mitchell* v. *Dors*, *ante*, vol. vi. 147.

say, the lord may not file a bill; stating, that he has approved under the Statute; and left sufficient common of pasture; and by the operation of the Statute the enclosure is become his exclusive soil, &c.; and to say, that a bill will not lie, to avoid multiplicity of suits, not in the nature of waste. But the material question is, what the prayer ought to be, whether merely for an injunction, or for the establishment of his exclusive right under the Statute, and to have that right declared. I never heard, that a mere bill for an injunction would have the effect of a bill for establishing the right against all others; and then it stands upon a different principle. In those cases the Court would have done a very strong thing in restraining even common of pasture till the trial, unless upon strong, probable, and pregnant evidence, that the commoners would not suffer in the mean time; and that the event would in all probability be, that there was sufficient common of pasture left. Of that, there must have been evidence; far beyond what there is here.

As to the Common of Estovers, the affidavits hardly verify one fact. An injunction cannot be had upon the mere apprehension that the defendants mean to do a great deal of mischief, by going into the wood and cutting down, when they deny the intention to cut, and that they mean to do more than according to their accustomed right. That principle has repeatedly been repudiated; particularly by Lord *Kenyon* in *Strathmore* v. *Bowes*. There must be some fact, or threat, not mere belief. [310] In that respect these affidavits, except as to one defendant, are insufficient. With respect to the damage, where a common runs through a wood, it is well known, that the cattle pick up a great deal in the glades; and if damage is done thereby to the young wood, it is not injury; for it is the consequence of the right. The affidavits do not deny the right of common. They do not admit it. But the bill stating, that it was claimed, but never enjoyed, I should have thought those affidavits insufficient as to all the defendants; and the only question would have been, whether, upon the ground of injunctions granted against trespass, the injunction might be given against that defendant, who has threatened to cut down all the woods and fences; and yet it would be doubtful even against him: the bill bringing forward a semblance of title to do many of the acts he said he would do.

Injunction in the case of trespass to prevent the multiplicity of suits.

The principle as to the multiplicity of suits is very clearly stated in *Lord Teynham* v. *Herbert*; (a) that in these cases there would be no end of bringing actions of trespass; and so it might be frequently; for there might be very different rights of common, and very different justifications. One might have it for cattle *Levant* and *Couchant*; another for common without stint, &c. So is *The Mayor of York* v. *Pilkington*. (b) Yet there is a great difference, when, instead of filing a bill in the first instance, and submitting to this Court to regulate the en-

(a) 2 *Atk*. 483. (b) 1 *Atk*. 282.

1802. joyment in the mean time, he goes first to law; and, having failed there, comes here, not to establish his right at the hearing, but to prevent their enjoyment till the hearing. In this case, a justification upon a right to Common of Pasture and Estovers, the plaintiff permits * himself to be nonsuited. The

HANSON. v. GARDINER.

[* 311] negligence of the agent is too slender a ground for deciding against persons, who have till the trial been in the exercise of the right, that the trial is to weigh nothing in support of it. It is a trial at law. Suppose, this bill had been filed before an action, and I had granted an injunction upon the affidavits till the trial of an action directed by me; and there was a nonsuit: it would be extraordinary after that to apply for a continuation of the injunction; and the Court would have some reason to reproach itself for having restrained the exercise of the right in the mean time. I think myself authorized to take what passed at law, as if an action had been directed by this Court. After that nonsuit the plaintiff opens the place enclosed; and admits their right by permitting the enjoyment. Then he makes an agreement for a compensation for shutting them out; as far as it goes an additional admission, at least not a denial of the right. His conduct therefore at and since the trial instead of affirming the allegations of the bill renders them improbable; and it is no answer, that it proceeded from mistaken advice or advice not followed up; when there is so much evidence of right of Common of Pasture and Estovers; the bill too alleging that claim: no negative of the right to be put in the balance against the nonsuit upon that very point permitted by the plaintiff; the answer of the defendants; no passage in any one of the affidavits, which I look at entirely without prejudice to the question, whether I ought to look at them, or not, containing any assertion of marks of ancient enclosures, and that the cattle did not pasture here, as far as they could, while it was unenclosed; the defendants swearing to the enjoyment of the right of pasture; and in this way, that if the 130 acres are enclosed, they will not have sufficient Common of Pasture; upon which there is no contradiction whatsoever.

[312] The injunction must be dissolved; and if there is any hardship as to the intermediate enjoyment, it is better that it should fall upon the plaintiff than upon the defendants.

1802.



July 6. 15. 19.

Ex parte KING.

A person attending under a summons of Commissioners of Bankrupt privileged from arrest. Ordered, that the parties arresting, and who had lodged detainers, having notice, should discharge him. The Attorney having undertaken to indemnify the officers, and they having acted under that, guilty of a contempt; and ordered to pay all costs out of pocket. The Lord Chancellor also intimated, that a creditor attending to prove his debt, though not under a summons is entitled to privilege.

A MOTION was made, that *John King* may be discharged out of custody; and that the persons concerned in arresting him may be committed for their contempt.

The affidavits in support of the motion stated, that *King* was arrested in *Guildhall;* where he was attending the Commissioners under a Commission of Bankrupt against *Lathropp*, for the purpose of proving a debt, and attending under a summons from the Commissioners. Upon application to the Commissioners for protection they refused to interfere, but gave notice to the officers, that they were proceeding at their peril. The affidavits also stated, that the officers said, they had an indemnity; that they did not care for being committed; and would execute the writ at all risks.

Several detainers had been lodged against *King* by other creditors subsequent to the arrest.

Mr. Mansfield, and Mr. Pemberton, in support of the Motion, mentioned *Arding* v. *Flower*, (a) and *Meekins* v. *Smith;* (b) where it was held, that a person attending the Court for any fair purpose having relation to a cause is protected.

Mr. Romilly, and Mr. Cooke, against the Motion, cited *Kinder* v. *Williams*. (c)

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* *Lord* CHANCELLOR.—Lord *Rosslyn's* orders were, that the party shall forthwith discharge him: and that seems to be right. There is this difference. Where the application is to affect only the creditor arresting, the Court may order the defendant to be discharged forthwith: but, where there are other detainers, the Court must hear those persons; in order to see, whether those detainers grow out of the original arrest. Accordingly Lord *Rosslyn's* order in the case from *Bristol* (a) was, that they do forthwith discharge him; and that is according to Lord *Hardwicke's* recommendation to discharge the man from the arrest; intimating, that if the party did not, the Court would order, that he should do so; and that is the prudent course; for, if the Chancellor has jurisdiction to order the discharge, and orders the discharge as the act of the party, there must be of course an end of all further question between the party and the Sheriff. The case of *Kinder* v. *Williams* does not decide any thing against this application: amounting only to this; that the case was not sufficiently laid before the Court to satisfy them that the Commissioners of Bankrupt were a Court of Justice; upon which they state no opinion; and they refuse to interfere; the application not being made in the right place: the Court, to which the application was made, not being a Court of which any contempt was committed. Lord

(a) 8 *Term Rep.* 534. (b) 1 *H. Black.* 636. (c) 4 *Term Rep.* 377.

(a) p. 313. *Ex parte Parker, ante*, vol. iii. 554. *Ex parte Hawkins, ante*, vol. iv. 691.

1802.

Ex parte KING.

Northington (b) goes a great way to intimate, that the commissioners could themselves discharge; and it deserves great consideration, before it is said, the creditor shall not be protected; for if the law obliges a man, or gives him an opportunity, to demand his debt in bankruptcy, and prescribes the

[314] particular mode of making that demand, and that mode requires his personal attendance before the commissioners, the same protection is necessary as he would be entitled to in attending any suit of his own in a Court of Justice. *(a)*

Party attending his own suit privileged from arrest.

But in this instance it is not necessary to consider that; for this person attending in obedience to the summons, if a creditor, stood also in the character of a witness. *(b)* In a case *(c)* before Lord *Hardwicke*, where an assignee removed, and ordered to account before the commissioners, and to pay over the balance, was arrested attending the execution of that duty, Lord *Hardwicke* thinking it absolutely necessary for the purposes of public justice, that he should attend the commissioners, took it up with a very high hand as a contempt of his authority; and ordered an examination upon interrogatories; intimating, that the party must immediately discharge him. It is clear from *Arding* v. *Flower*, that, whatever was the opinion of the Court of King's Bench before, they then thought the bankrupt's privilege, *(d)* not founded only upon the Act of Parliament; *(e)* and I concur in that principle; which would require protection for the bankrupt doing those duties; and there are several cases showing that, without the authority of the Act. The question then is, whether the same principle, that would, independent of the statute, protect the bankrupt, ought to protect the witness. In *Ex parte Stow*, *(f)* Lord *Northington* entertains no doubt, that the authority

Bankrupt's privilege from arrest in attending the commissioners, independent of the Stat. *5 Geo. II.*

[315] created for the assistance of the Court must have that power vested in them; and that has been followed: so that there is the authority of Lords *Hardwicke*, *Northington*, and *Rosslyn*. In this case there being several detainers by persons, who found *King* in custody, I shall follow the order of Lord *Rosslyn* in the case from *Bristol;* that the creditors having an opportunity of being heard, and being heard, or neglecting that opportunity, should forthwith discharge the person out of custody. If the original arrest cannot stand, those detainers cannot stand. There is great good sense in that; for the Court ought to take care that the Sheriff should not be left liable to an action; and under such an order it is their act in obedience to the authority of the Court.

I shall therefore order, that the several parties, who shall

(b) *Ex parte Stow*, 13th *Nov* 1762. Stated 2 *Black.* 1142.

(a) p. 314. *Bromley* v. *Holland, ante,* vol. v 2. *Moore* v. *Booth, ante,* vol. iii. 350. *Ex parte Ledwich, Post.* {vol. viii. p 598.}

(b) See *Ex parte Lund, ante,* vol. vi. 781.

(c) *Ex parte Kerney*, 1 *Atk.* 54.

(d) *Ex parte Donlevy*, the next case. *Ex parte Parker, ante,* vol. iii. 554. *Ex parte Hawkins, ante,* vol. iv. 691.

(e) Stat. 5 *Geo.* II. c. 30. s. 5.

(f) Stated 2 *Black.* 1142.

appear to have been served with notice of this motion, do forthwith discharge *King* out of custody.

July 15.

The rest of the motion stood over, to give the officers an opportunity of answering the affidavits upon the circumstances of the arrest. They accordingly by affidavit denied, that they arrested *King* in *Guildhall;* that he had got some way from it; and they supposed his examination was finished; that they were called upon suddenly for this purpose at *Guildhall;* and the attorney said he would indemnify them; and they were not to mind any paper *King* might show as a protection.

On behalf of the officers it was observed, that this was no premeditated contempt of the officers, but a mistake of the law; which is very doubtful, as appears by *Kinder* v. *Williams;* that as to the bankrupt himself or the assignees the commissioners have a general jurisdiction: as to third persons only in particular cases: viz. where persons are supposed [316] to have property of the bankrupt in their possession; and that the commissioners might not have had authority to summons *King*.

The Lord CHANCELLOR.—An attorney desiring an officer to do an act at all hazards is guilty of a contempt, if that person is guilty of a contempt; and no officer shall say, he is indemnified, if he advisedly acts contumeliously to the authority of any court. Officers must understand that it is impossible for any person to indemnify them against a contempt. Let the attorney therefore make an affidavit.

July 19.

An affidavit by the attorney was read; admitting, that he told the officer he would indemnify him; but that he merely meant by that to assure the officer, that what he was to do was legal, and to prevent him from being intimidated.

The Lord CHANCELLOR.—The conduct of the attorney was rash; but he did not intend a contempt. An indemnity against the consequences of a contempt is very different from an indemnity against any thing of damage. I should pause long, before I should determine, that, if the creditor was attending merely to prove his debt, and not upon a summons, he should not be privileged; that being the only way, in which in the case of a bankruptcy he can sue. Upon the affidavits it does not appear that the officers were aware, that they were acting in contempt of the Court; and the authority, under which they acted, is a considerable alleviation of their conduct. Though I have not the least doubt, that a person attending the commissioners, particularly under a summons, has this protection, and I agree entirely with Lord *Kenyon* in *Arding* v. *Flower*, yet there has been doubt upon the subject; and the language in the report of *Kinder* v. *Williams* is loose. [317]

1802. Ex parte KING.

Therefore, letting it now be perfectly understood that this must not happen again, I will not go further than to order all the costs out of pocket to be paid by the attorney and the two officers.

July 19. 21.

Ex parte DONLEVY.

A bankrupt's privilege from arrest extends to the end of the forty-second day. Ordered, that the plaintiff in the action should discharge him; and the officer having acted without instructions was ordered to pay the costs.

Whether a deviation by a bankrupt, returning from examination, for the purpose of leaving his books at the house of the assignee, will deprive him of his privilege, *Query.*

THE prayer of this petition was, that the petitioner may be discharged out of custody. The petitioner a bankrupt, left *Guildhall* after his examination on the forty-second day; and was arrested for debt, before he got home; living in *Charles Street.* According to his affidavit he went out of his way merely for the purpose of leaving his books at the house of his assignee in *Bunhill Row.*

Mr. Mansfield, and Mr. Cooke, in support of the Petition.—The bankrupt is protected by the Statute (a) for the whole of the forty-second day. But he is also protected, being in his way home from *Guildhall*, where he was under examination before the Commissioners; and this is not such a deviation as will deprive him of his privilege. If his intent was to go home, a little deviation to the right or the left will not be attended to strictly: otherwise a question might arise, which was the nearest way. *Lightfoot* v. *Cameron.* (b) In *Hinckston's* case (c) the bankrupt attended his last examination at *Chesterfield* on the forty-second day. He lived at the distance of forty miles. He went from *Chesterfield* to *Manchester*, to get some information as to a debt; and was induced to stay at an Inn in *Manchester* till past twelve at night; and immediately after twelve was arrested. In that case * there was a fraudulent intent to induce him to stay. It shows, however, that the privilege is considered to extend to the end of the forty-second day: which is the true construction of the act.

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The Lord CHANCELLOR.—I think your construction of the act is right; that the bankrupt is privileged for the whole day; and that makes an end of any difficulty upon the other point. The order I shall make is, that the plaintiff shall forthwith cause him to be discharged. The plaintiff offering to make an affidavit, that he gave no instructions to the officer, let him make such affidavit, as he may think proper; and then I shall dispose of the costs. It was said in *King's* case, (a) that this mode of making the order shows a doubt in my mind, whether the party is entitled to be discharged. I have no such doubt; and am satisfied, Lord *Kenyon* was perfectly right in *Arding* v. *Flower*: (b) but where I can protect the Sheriff from the vexation of an action for an escape, though satisfied it would be ill founded, it is a much better way of administering

(a) Stat. 5 *Geo.* II. c. 30. s. 5. (b) 2 *Black.* 1113.
(c) In 1759 before Lord *Northington.*
(a) p. 318. The preceding case. (b) 8 *Term Rep.* 534.

justice upon these points than by ordering the officer at his peril to discharge the man. 1802.

Ex parte DONLEVY.

The plaintiff made an affidavit accordingly; and upon the affidavit of the officer it appeared, that he had acted from mistake. *The Lord* CHANCELLOR said, though it was a hard case, the party must have his costs from the officer. Having a right to be discharged, he must be discharged at the expense of those who arrested him. (c)

(c) *Sidgier* v. *Birch, post.* {vol. ix. p. 69.}

BAILEY *v.* EKINS.

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July 16.

A charge for payment of debts makes equitable assets. (1)

WILLIAM GARRETT, by his will, dated the 26th of *February*, 1779, directed, that all his just debts, funeral expenses, and legacies, should be justly and truly paid and discharged; and he thereby charged and subjected all his real and personal estates with the payment of the same; and he thereby gave, devised, and bequeathed, all his messuages, farms, lands, tenements, hereditaments, and premises, therein described, and also all and singular his goods, chattels, and personal estate, of what nature or kind soever, unto *John Ekins*, *Peter Morris Goddard*, and *Edward Salter*, and to the survivors and survivor of them, and the heirs, executors, and administrators, of such survivor; in trust to sell and dispose of the same and every part thereof, as soon as conveniently might be after his decease, to any person or persons whomsoever, for the best price or prices, that could be had or gotten for the same; and out of the money arising by sale thereof to pay and discharge his just debts, funeral expenses, and legacies, and he gave and bequeathed all monies, that should remain in his said trustees hands, after they had paid his just debts, funeral expenses, and legacies, as aforesaid, and also all other his real estates either in possesssion, reversion, remainder or expectancy, or otherwise howsoever, not therein before disposed of, with their and every of their appurtenances, unto his said trustees and to the survivors and survivor of them, and the heirs, executors, and administrators of such survivor; in trust to place the said monies out at interest upon the best security or securities, that could be obtained for the same; and to receive and take such interest from time to time, as the same should grow due, together with the rents, issues, and profits, of the said real estates; and [320] thereout to support, maintain, and educate, his son *William Wither Pincke Garrett*, in such manner as they in their discretion should think proper, until he should obtain the age of twenty-one years; and when he should attain that age, then he gave, devised, and bequeathed, the said monies so placed at

{(1) *Rutgers's Ex.* v. *Le Roy et al.* 4 Johns. Cha. Rep. 651.}

1802. interest and the said real estates unto *William Wither Pincke Garrett*, his executors, administrators, and assigns; and also he gave, devised, and bequeathed, unto his daughters *Elizabeth Mary* and *Anne Garrett*, the legacy or sum of 1500*l*. a piece, to be paid to them severally and respectively as they should attain the age of twenty-one years or be married; and in the mean time and until they, his said daughters, should have obtained that age or be married, he directed his executors hereinafter named to pay unto each of them so remaining under age and unmarried, the sum of 60*l*. per annum for their support and maintenance; and he appointed *John Ekins*, *Peter Morris Goddard*, and *Edward Salter*, guardians of his said children during their minority, and executors in trust of his said will.

BAILEY *v.* EKINS.

The testator died in *August*, 1779; leaving one son and four daughters. The bill was filed by creditors; who had obtained administration with the will annexed; and the real estates were sold under the decree, directing the fund to be applied in a course of administration; and the specialty creditors were paid 10*s*. in the pound. The cause came on for further directions, and upon a petition by creditors by simple contract; praying, that the petitioners may be paid a like proportion of 10*s*. in the pound on their respective debts, equal with the other creditors out of the produce of the real estate.

[321] *Mr. Richards*, *and Mr. Trower*, *in support of the Petition*.—This cause stood over for the purpose of inquiring, whether any modern case has decided, that a general charge upon an estate descended makes it equitable assets. It has always of late been so considered; but not actually decided, except in *Burt* v. *Thomas*.(*a*) If in *Plunket* v. *Penson*,(*b*) Lord *Hardwicke* considered the estate as equitable assets, as being charged, it would not have been necessary to make the distinction. Upon the Statute (*c*) of fraudulent devises this is equitable assets. The Court aiming at making equitable assets, the Act has a view to that case; and really does not affect the interest of the person claiming under the charge. Before the Statute, though a devise would have disappointed the specialty creditor, it would not, if charged with specialty debts; and a devise in trust for payment of debts would have been equitable assets without doubt. Is not a charge a limitation, appointment, devise, or disposition, at least, in favour of creditors; and therefore out of the Statute? Then, as it was necessary for the creditor to come into this Court, the Court laid hold of the property; making it equitable assets. The great contest at first was upon a devise to the executor. Afterwards it was held, that, the descent being broken, the assets were equitable. Then the doubt arose as to a power to the executor; and it came to this conclusion at last; that, wherever the produce of the estate comes to the executor, it

(*a*) In the Court of Exchequer. (*b*) 2 *Atk*. 290.
(*c*) Stat. 3 and 4 *Will.* and *Mary*, c. 14.

would be equitable assets. The principle of the doubt was, that in the one case the testator having converted the estate into personal property, all the consequences follow. But the moment the Court holds it equitable assets in the hands of the executors, it follows, that it is so in the hands of the heir; it is too late now to contend, that the descent must be broken, though certainly the old cases were so. In *Burt* v. *Thomas* it was decided upon argument, that a charge made the assets equitable. In *Newton* v. *Bennet*, (a) though Lord *Thurlow* is represented as intimating, that the descent must be broken, that was not required in that case; and in *Burt* v. *Thomas*, in which case the question was much agitated, Mr. Baron *Thompson* stated from his own note, that the report is inaccurate in that respect, and Lord *Thurlow* said no such thing, but considered a charge sufficient. *Batson* v. *Lindegreen* (b) was a mere charge. Though the heir takes by his better title, yet upon this question it makes a considerable difference as to the title. If there is a devise to the heir in trust to pay debts, he will be a trustee; though in one point of view he takes by descent. There can be no doubt, the intention is the same in the case of a charge as upon an express devise; which the Court would clearly consider a trust for all the creditors.

1802.

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The Attorney-General, for the Specialty Creditors, contended, that by this will the descent was not broken; and that a charge has not the effect of making the assets equitable.

Devise, charged with debts, to trustees and their heirs; in trust to receive and take the rents, issues and profits; and thereout to support and educate the devisor's son till the age of 21; and then to him. Not a use executed in the son before the age of 21.

The Lord CHANCELLOR.—The question upon this will, if it turns upon the point whether the descent was broken, would be, whether during the infancy of the heir the legal estate was in him; and if it was necessary to determine that, I am rather inclined to think, it was not; that the use was not executed in him; considering the words of the will. At the same time it turns upon great nicety. But I do not determine this upon the circumstances of the will; for *Hargrave* v. *Tindall*, (c) and * *Burt* v. *Thomas*, and *Batson* v. *Lindegreen*, as I charge my own memory with it, are all authorities, that a charge upon real estate does make it equitable assets. I also confirm, upon my own memory what Baron *Thompson* is stated to have said in *Burt* v. *Thomas*; for I am confident, Lord *Thurlow's* opinion was, that a charge is a devise of the estate in substance and effect *pro tanto*, upon trust to pay the debts. The rule cannot be accurate, when it is stated, that the descent ought to be broken. It would be more accurate to state it thus; that it must appear upon the will, that the testator meant the descent to be broken. Suppose a devise to trustees, in trust to pay debts; and, all the trustees dying in the life of the testator, the estate descends upon the heir; would not that be equitable assets? By the failure of the devise the heir must

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(a) 1 Bro. C. C. 135.

(b) 2 Bro. C. C. 94.

(c) 1 Bro. C. C. 136, (note.)

1802. BAILEY v. EKINS.

have had it, as the trustee would, subject to the debts; and yet the descent is not broken, but intended to be broken. But, when it is said, the heir takes by his better title, still the question is, whether he takes as he would if that devise had not been made; taking all the circumstances of the devise together. A mere charge is no legal interest. It is not a devise to any one, but that declaration of intention, upon which a Court of Equity will fasten; and by virtue of which they will draw out of the mass going to the heir, or to others, that *quantum* of interest which will be sufficient for the debts; and then getting it into their hands, the only inquiry will be, whether the Statute interposes to make it fraudulent against specialty creditors. The uniform rule is, that a provision by will, effectual (a) in law or in equity for payment of creditors, is not fraudulent within the intent of the Statute.

A provision by will, effectual in law or in equity for payment of creditors, is not within the Statute of fraudulent devises.

Upon principle therefore, but, what is infinitely more satisfactory to me, upon authority, I am of opinion upon * this will, that, whether the descent is broken, or not, this is equitable assets; and that is a better way of deciding this case than applying to the will, to see, whether the descent is broken, or not; that the principle of my decision may be understood; and reviewed, if wrong, but that will be at the risk of undoing what I considered very well settled. (a)

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In consequence of this judgment it was agreed, that the direction of the decree should be got rid of by a short petition of rehearing; all parties consenting. That petition was presented; and the decree varied accordingly.

(a) See *Lingard* v. *The Earl of Derby*, 1 *Bro. C. C.* 311. *Hughes* v. *Doulben*, 2 *Bro. C. C.* 614.

(a) p. 324. *Shiphard* v. *Lutwidge*, *Post.* {vol. viii. p. 26.}

July 16.

THE BISHOP OF HEREFORD *v.* ADAMS.
LADY TWYSDEN *v.* ADAMS.

Bequest in trust for the poor inhabitants of several parishes; to be applied at times and in proportions, and either in money, provision, physic or cloaths, as the trustees think fit.

GEORGE JARVIS, by his will, dated the 9th of *January*, 1790, gave to his daughter Lady *Twysden* an annuity of 200*l.* for her life, and to his grandsons *Heneage* and *Thomas Twysden* 1000*l.* a-piece, to be paid within three months after his decease. He gave to trustees 20,000*l.*: upon trust as soon as conveniently may be after his decease to place the same out upon Government or Real Securities; and out of the dividends and interest to allow any sum not exceeding 200*l.* *per annum* for the maintenance and education of his great granddaughter Lady *Mary Montgomery* until her age of * 21; at which time, he directed all the securities with the accumu-

The fund being very considerable in proportion to the objects, the application was, upon the principle of *cy pres*, extended for the benefit of the same objects to purposes not expressly pointed out by the will; as instruction and apprenticing of children; against the claim of the next of kin.

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lation to be transferred to her for her absolute use and benefit; but if she should die, before she should have attained the age of 21, he directed, that 10,000*l.* part of the sum of 20,000*l.* should be paid to his other great granddaughter Lady *Susanna Montgomery*, when she should have attained the age of 21, and that the remainder should fall into the residue of his personal estate.

1802. The Bishop of HEREFORD v. ADAMS. Lady TWYSDEN v. ADAMS.

The testator then, after some inconsiderable legacies, which he directed to be paid within two months after his decease, gave to the Bishop of *Hereford* for the time being, and other trustees, the sum of 30,000*l.* to be paid out of his personal estate; upon trust, that they or the survivors, &c. shall, as soon as conveniently may be after his decease, place out the said sum of 30,000*l.* on Government securities, and from time to time sell the securities, and place out the produce again, and so for ever hereafter, as often as there shall be occasion, and pay and apply the yearly dividends, interest, and yearly produce of 11,000*l.* part of the said securities, unto and amongst such number of the poor inhabitants of the Parish of *Staunton-upon-Wye*, in the county of *Hereford*, at such times and in such proportions, and either in money, provision, physic, or clothes, as the said trustees or the major part of them for the time being shall from time to time think fit, for the better support and maintenance of such poor inhabitants; and the dividends, &c. of 13,000*l.* other part of the said securities, unto and amongst the poor inhabitants of the Parish of *Bredwardine*, in the county of *Hereford;* and the dividends, &c. of the remaining 6000*l.* unto and amongst the poor inhabitants of the Parish of *Lettor* in the said county, with similar directions for the application of those funds. All the rest, residue, and remainder of his property and effects after payment of [326] his debts, funeral expenses, and legacies, and subject to two annuities, he gave and bequeathed to the Bishop of *Hereford*, and the other trustees, upon trust, that they or the survivors shall, as soon as conveniently may be after his decease, pay, distribute, and appropriate, the whole of such residue to the charitable purposes aforesaid, as they or the survivors of them should think fit or appoint: but he directed, that none of the said trust monies be appropriated in erecting any public or other building whatever.

By a codicil, dated the 13th of *September*, 1791, reciting, that he had by his will given the residue of his personal estate, upon trust to pay, distribute, and appropriate, the whole of such residue to the charitable purposes aforesaid, he declared his mind and will, that as the same should from time to time come in the hands of the trustees, the same should be put and placed out in the public funds with the other trust monies given by his will; and that the interest thereof only from time to time be applied to the charitable purposes in proportion to the other trust monies given by his will to the poor inhabitants of the said three parishes therein named;

1802. and in all other respects he confirmed his will. He afterwards made another codicil, also confirming the will.

The Bishop of HEREFORD v. ADAMS. Lady TWYSDEN v. ADAMS.

The testator died in *February*, 1793. The first bill was filed by the trustees to have the accounts taken, and the directions of the Court. The second bill was filed by Lady *Twysden*, the daughter of the testator, to have the bequests of the legacy of 30,000*l.* and of the residue declared void. By the decrees in these causes both the trustees and Lady *Twysden* were permitted to lay proposals before the Master for a Scheme.

[327] Upon the Master's report it appeared, that the funds provided by the will for the support of the poor of these parishes consisted of 66,715*l.* 2*s.* 9*d.* Bank 3 *per cent.* Consols; 603*l.* 12*s.* 8*d.* 5 *per cent.* Annuities: 4024*l.* 4*s.* 4*d.* Bank Stock; and 2201*l.* 6*s.* 3*d.* cash. The report also stated, that in the parish of *Bredwardine* the number of poor inhabitants, who receive alms amounts to 30; of the poor inhabitants, who do not receive alms, to 187: the non-resident inhabitants having legal settlements were 66: and the poor rates about 185*l* a-year. In the Parish of *Staunton* the poor inhabitants receiving alms were 17: those not receiving alms 262: the non-resident parishioners, having legal settlements, 61; and the poor rates 225*l.* In *Lettor* there were no poor inhabitants receiving alms: those not receiving alms were 44: the non-residents, having legal settlements, 9; of whom 8 receive alms; and the poor rates amount to 85*l.* a-year. The proposal of the trustees, calculating the income for the Parish of *Bredwardine* at 1003*l.* per annum, was as follows:

	l.	*s.*	*d.*
For physic and attendance to the poor -	50	0	0
Clothing, bedding and bed clothes	330	0	0
Fuel - - -	135	0	0
Food in the manner stated in the report	281	6	0
Payments for schooling - -	60	0	0
Payments to apprenticing poor children	60	0	0
Proportion of the salary of an agent -	25	0	0
Occasional gratuities to servants and apprentices conducting themselves well	61	14	0

There was no medical man within the distance of nine miles.

[328] The proposals as to the other parishes were similar, in proportion to their difference of income.

Lady *Twysden* proposed, that the annual sum of 1156*l.* 13*s.* 4*d.* should be apportioned among the poor of the three parishes for the purposes of the will; as being amply sufficient; and that the residue should be paid to her.

The Master approving the proposal of the trustees, Lady *Twysden* excepted to the report.

Mr. Mansfield, Mr. Romilly, and Mr. Pemberton, in support of the Exception.—This Court will not establish so mistaken a charity; which is in effect a premium to idleness. After

all this specific provision there will be a large surplus: which the trustees cannot dispose of according to any intention of the testator; and therefore they propose other objects: viz. rewards of virtue, and the instruction and apprenticing of children.

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The Bishop of HEREFORD v. ADAMS.

Lady TWYSDEN v. ADAMS.

The Attorney-General, Mr. Piggott, Mr. Richards, and Mr. Hart, for the Report.—The purpose of this will must be executed by some such scheme as the Master has approved. The *quantum* of the property can make no difference, if the law says it ought to be distributed in charity by this Court. In *The Attorney-General* v. *The Mayor of Coventry*, (a) the increase of the fund was given to the charity. *The Attorney-General* v. *Green*, (b) *The Attorney-General* v. *Oglander*, (c) and *The Attorney-General* v. *The Earl of Winchelsea* (d) are also in favour of the Charity. Apprenticing comes within the meaning of the word "*money*." There is nothing to prevent trustees, having the power of giving money to poor people, from annexing to the gift an injunction to lay it out in a particular manner, for the beneficial and truly charitable purpose intended by the testator, instead of dissipating it. They have a control from the subsequent donation, though not directly. [329]

The Lord CHANCELLOR.—The plan of Lady *Twysden* is liable to many of the objections capable of being made to the other; and as to giving the surplus to her, in the present state of the record it is impossible; for such purpose cannot be said to be part of a plan for distributing in charity according to the testator's will. Her claim must be on the ground, that the object aimed at is impracticable in fact, or, which is the same thing, in law; and, that, the property being undisposed of, she is entitled as next of kin. As to the plan of the trustees, I have nothing to do with arguments of policy. If the legislature thinks proper to give the power of leaving property to charitable purposes recognised by the law as such, however prejudicial, the Court must administer it. If it is right to put bequests of personal property to charity under the same fetters as real estate, that is for the legislature; and Courts of Justice must act without regard to the impolicy of the law. It cannot be supposed, this testator was unacquainted with the state of these parishes: the will being made only three years before his death. If he had been asked as to the particular mode of executing his plan, he would probably have been under as much difficulty as the Court is. In two codicils he confirms the disposition made by the will. If this can practically be carried into effect in point of law, there is so little objection, that the Court is bound to give it effect. The testator certainly thought so. If that is founded in error, Lady *Twysden* would have more to do, to get at the surplus, than to say, it could not be practically applied. She must contend, [330]

(a) 2 *Vern.* 397.
(b) 2 *Bro. C. C.* 492.
(c) 3 *Bro. C. C.* 166.
(d) 3 *Bro. C. C.* 373.

1802. The Bishop of HEREFORD v. ADAMS. Lady TWYSDEN v. ADAMS.

that the application to charity must be precisely, as it is given by this will: a point certainly not settled; and that could not be settled upon these exceptions. If her claim was grounded, not upon the impracticability, but upon the impolicy, of the object, there will be much more difficulty, before she gets rid of the *cy pres* doctrine; upon many of the cases, particularly *De Costa* v. *De Pas*, (a) which I lately had occasion to refer to; (b) imputing to the testator a general intention of embalming his memory; as Lord Chief Justice *Wilmot* says. Upon either head, therefore, it is open to serious argument whether she can take it.

The Master's report by no means satisfies me that no plan can be devised that ought to be carried into execution. With a very small variation of phrase this report itself would give such a plan; and the doubt I have at last is, whether it is fit for the Court to do that in an indirect way, by sending it back to the Master, or to say, that by fair reasoning what the Master has now proposed is consistent with the intention of the testator, however shortly expressed in the will. As to the time and proportions he has altogether confided in his trustees, subject to the exercise of a sound discretion, to be exercised by this Court: not as to the manner; for that is prescribed by him. I construe it "poor inhabitants, not receiving alms." If the word "*money*" alone had been in the will, it could not be said, that you could give the money to the poor inhabitant, enabling him to purchase fuel, provisions, and clothes, and that it is misapplied, if the trustees procured [331] those necessaries, and with his consent paid for them. It would be strong to make that distinction. The words, "provision, physic, and clothes," might therefore have been left out of the will. I look upon them rather as designating to the trustees, how they were to apply the money, than as actually necessary. It is impossible for me to object to the medicines: the testator having expressly said, money laid out in physic would be a good application; and 50*l*. a-year is very little for so many poor families. As to fuel, if the report proposed to advance money for that purpose, that would be directly within the words; and the Court will not disapprove it, if the purposes of the plan are secured by the plan. There is no weight therefore in that objection to the plan, merely because it does not give the money for that purpose. Then clothes and provision are expressly within the will. As to the last sums in the report, I agree, the money is proposed to be disposed of in a more useful way than any other. The question is, whether in the fair sense of this will, if money is given to a schoolmaster to teach a poor boy reading and writing, that is an abuse of the charity, or an advance of money within the intent and meaning of the will. It is very erroneous to say, that, which may tend to make it unnecessary to advance to

(a) *Amb.* 228.
(b) See *Moggridge* v. *Thackwell, ante,* 36: the great case upon the subject of charity.

that boy or his parents, money, provision, or clothes, in future, was advanced contrary to the will; the advance being made to the intent, that he should have that education that would enable him to get his own bread, and maintain his parents. But Lady *Twysden* has no interest in that question; for if that would be wrong, it might be divided among the others; so as to disappoint her.

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Next as to apprenticing: suppose the master for a small fee covenants to maintain the boy: would it be contrary to the fair exposition of such a will to advance that money to that person, to relieve the trust from an application from time to time [332] according to the trust? If the money was given to the boy himself, and he was to pay it as an apprentice fee, that would be within the will; and the only alteration of the report would be in that respect; and I will not send it back to the Master for that. The best plan perhaps would be to apply according to their own notions from time to time; laying their account of it annually before the Master: but I cannot lay trustees under those difficulties. Unless therefore Lady *Twysden* can lay before the Court a plan, under which she can contend for a distribution of the property as to part of it upon this principle, that the testator has not given it away, she is not very usefully for herself or the charity contending, whether a payment of money for the benefit of a poor person is within the strict letter of this will a payment to that poor person.

Therefore it is best upon the whole to confirm the report; declaring, that I do it, conceiving the plan therein contained agreeable to the true construction of the testator's will. All parties must have their costs as between attorney and client; including Lady *Twysden's* also.

WARING *v.* WARD. (1)

July 17

The heir of a purchaser exonerated by his personal assets from a mortgage: the result of the transaction being a personal contract; and the personal assets therefore the primary fund.

THE instruments and circumstances, upon which this cause was instituted, are stated in the former report. *(a)*

By the decree, made upon the 1st of *December*, 1800, the usual accounts of the personal estate, &c. of *Richard Hill Waring* were directed; and it was ordered, that the personal estate should be applied in payment of the debts, other than the mortgage debt, &c. in a course of * administration. An account was directed of what was due upon the mortgage of 30,000*l.* It was declared, that the bequest of the residue of the personal estate to the testator's first wife, upon trust to discharge all his debts, for which at the time of his decease he should not have given real securities, &c. became lapsed at [* 333] the death of his said wife in his lifetime; and in case the per-

(a) Ante, vol. v. 670.

{ (1) Cited and remarked upon, 3 Johns. Cha. Rep. 258.

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sonal estate should be more than sufficient for payment of his debts, not secured by mortgage, the consideration, whether the plaintiff is entitled to have the estate descended to him exonerated from the payment of such part of the money due upon mortgage of the said estate, as was due to *Ruth Trevor* upon the 27th and 28th of *February*, 1771, the date of the conveyance of the said estate by the testator to Sir *Robert Cunliffe*, subject to redemption on payment of 20,000*l.* and interest, and further directions, were reserved.

The Master's report stated the accounts of what was due upon the mortgages; and that the personal estate was much more than sufficient for the debts not secured by mortgage. The cause came on for further directions upon the question reserved by the decree.

Mr. Lloyd, Mr. Richards, and Mr. Romilly, for the Plaintiff.—The decree having determined the question as to the money borrowed by the testator from Sir *Robert Cunliffe*, the only remaining subject for consideration is as to the money due to the *Trevors;* whether there is any distinction between the two sums. It will be contended, that this was a mere purchase of the equity of redemption. It is not so. This is a mortgage, not only of the estate in the original security, but also of another lot, purchased by the testator; who, having bought these estates, paid 12,500*l.* to the plaintiffs in the cause, being bond [334] creditors and mortgagees; and having borrowed 20,000*l.* from Sir *Robert Cunliffe*, that sum was paid into Court in that cause; and 17,852*l.* 12*s.* 9*d.* was paid in discharge of *Trevor's* mortgage. The mortgage to *Cunliffe* was, to all intents and purposes, a new mortgage. The testator made the purchase as a mere stranger; becoming personally liable; and conveying to *Cunliffe* not only the estates subject to the original mortgage, but what was purchased. Then there can be no doubt this was a purchase for which his personal estate became liable.

The case of *Tweddell* v. *Tweddell (a)* and various others of that class have decided, that a mere purchase of an equity of redemption, without any communication with the mortgagee, will not make the mortgage the personal debt of the purchaser: otherwise, if there is any thing further, showing the intention. *Woods* v. *Huntingford (b)* resembles this case very much. There can be no doubt an action might be brought upon the testator's covenant. It is clear he meant to go further than merely to take the equity of redemption; being perfectly a stranger; and making himself personally liable; and mortgaging also other lots, not at all involved. The stipulation was for a mortgage, not for an assignment. The loan was transacted with the testator alone. Then all the purchase money being got into Court he gave his bond. There was no dealing with the *Trevors;* who were not at all parties to the transaction: but the sum reported due to them was paid out of the general fund in Court.

(a) 1 *Bro. C. C.* 101. 152. (b) *Ante*, vol. iii. 128.

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The Solicitor-General, and Mr. Steele, for the Defendants.—This is a mere purchase of an equity of redemption: a transfer of a mortgage from the *Trevors* to * *Cunliffe;* who agreed to advance the money due; and all the testator did was personally to covenant for the payment of the debt. Still the debt re- [* 335] mained upon the estate; which is the primary fund. *Bagot* v. *Oughton (a)* and the other cases have decided, that a mere covenant will not make the party in the first instance liable as between the real and personal representatives. *Tweddell* v. *Tweddell* is very like this case. *Woods* v. *Huntingford* does not in principle apply. By the subsequent transaction they changed situations; and *Richard Huntingford*, before liable to pay the money at law, thereby became liable in equity. Upon the authorities collected in *Mr. Cox's* note *(b)* the covenant will not do.

Mr. Lloyd, in Reply.—The distinction between this case and *Tweddell* v. *Tweddell* is, that in this there was no communication with the mortgagee. It is true, as the Master of the Rolls observed, these cases go upon very nice distinctions. How can any purchaser have more than the equity of redemption, if he never pays off the mortgage? It is therefore no objection, that he has nothing but an equitable estate. How can this be only an assignment of the original security? It is a distinct transaction. The *Ince* estate is sold; not sold subject to the mortgage. Another lot is sold; for which the testator paid 2000*l.* In that the *Trevors* had no interest. They were paid out of the whole fund of 32,000*l.* the testator's own money; not out of the specific sum produced by that estate. This is not conveyed as an assignment. The concurrence of the heir at law was necessary; but not as to the lot purchased for 2000*l.*; as to which they were mere strangers. The tes- [336] tator and his wife, she being the heir at law of the original mortgager, did ratify and confirm it. The former proviso of redemption is discharged; and there is a new one; if *Richard Hill Waring* pay, &c.

The Lord CHANCELLOR.—I am of opinion the personal estate is first liable to the payment of this sum of 20,000*l.*; for that is the real question; and therefore to the payment of all the component parts of that sum. The rules as to this subject are extremely clear; and the principle, upon which the personal estate is first liable in general cases, is, that the contract primarily is a personal contract: the personal estate receiving the benefit; and being primarily a personal contract, the land is bound only in aid of the personal obligation to fulfil that personal contract. It has long been settled, therefore, that upon a loan of money, the party meaning to mortgage in aid of the bond, covenant, or the simple contract debt, if there is

(a) 1 *P Will.* 347.
(b) 2 *P. Will* 664. See also *Hamilton* v. *Worley, ante,* vol. ii. 62, and *Butler* v. *Butler, ante,* vol. v. 534.

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No exoneration of the heir by the personal assets of a party, who never personally contracted; or not originally, but only as a further security in a subsequent transaction, not intended to disturb the order of charge: as the transfer of a mortgage; or the purchase of an equity of redemption: even though the interest is raised, the excess follows the subject of the original contract.

neither bond nor covenant, his personal estate, if he dies, must pay the debt for the benefit of the heir. Suppose a second descent cast; and the question arises between the personal estate of the son and his real estate descended to the grandson: then the personal estate of the son shall not pay it; as it never was the personal contract of the son. (1) So, upon the transfer of a mortgage, not originally the personal debt of the party, by adding his personal contract he will not make his personal estate liable in the first instance; as a son transferring a mortgage by a father: the personal covenant of the son to pay the money does not make it originally a personal contract of his. It remains still the personal debt of the father, secured by a pledge of his land, and * secured further by the personal contract of the son. That contract of the son is in the third rank of securities, instead of the first; and Lord *Thurlow* carried that doctrine to this extent; that, where there was a mortgage, and afterwards upon a transfer the person, to whom the equity of redemption belonged, covenanted for the money; and also to raise the interest from 4 to 5 *per cent.*; though the person who first made the mortgage never was liable upon his personal contract beyond 4 *per cent.* yet between the personal and real representatives of the party who raised the interest to 5 *per cent.* he thought the additional 1 *per cent.* not primarily a charge upon the personal estate; as it was an obligation growing out of a transaction, the intention of which was not to disturb the order of charge. The same principle applies to the purchase of an equity of redemption; for the

[* 337] party means at the time of the contract to buy the estate subject to that mortgage; in relation to which mortgage the personal contract was entered into; and that was not his. If he enters into no obligation with the party from whom he purchases, neither by bond nor covenant of indemnity to save him harmless from the mortgage, yet this Court, if he receives possession, and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage.

The case of *Tweddell* v. *Tweddell* certainly went upon this principle; that the debt due to *Delaval* was never a debt due directly from that person whose personal assets they sought to have applied in payment of it. Whether that was quite accurate depended upon the construction of the articles of agree-

[338] ment and the deed executing them. But, taking the articles and the deed together, it may very well be said in support of the decree, that the real intent, notwithstanding the particular expressions in those instruments, was, that the purchase between the vendor and vendee was a mere purchase of an equity of redemption; not meaning by that transaction to dis-

{(1) 3 Johns. Cha. Rep. 274.}

turb the mortgage as a mortgage, to alter the contract itself, even in respect of the sum due. *Mr. Madocks*, who, I recollect, was not satisfied with the decision, laid great stress upon the recital, that *John Aynesley* had contracted for the absolute purchase of the premises. Whether Lord *Thurlow* was right or ill founded in the opinion, that upon the whole, either the agreement at first, or the deed executing it, the contract was for an equity of redemption and nothing more, reasoning upon the facts, yet the case is a clear authority, that, if he decided the fact right, such a contract, for a mere equity of redemption, will not make the mortgage debt, which is to remain an encumbrance upon the estate, the debt of the person buying under those circumstances; for in his hands it is the debt of the estate: a mortgage interest as between his representatives. But that case differs totally from this. To assimilate them I must suppose, that this testator treated for the Manor of *Ince* subject to the mortgage to the *Trevors*; and had paid into Court so much money as was the value of the equity of redemption subject to that mortgage. In that case he would have been bound in conscience, if no such obligation was taken from him, to indemnify those who conveyed the equity of redemption to him against the mortgage. But this transaction is not at all with reference to that mortgage. It is a purchase of the inheritance of the premises. The sum of 30,500*l.* the purchase-money, was to be paid, not as in *Tweddell* v. *Tweddell*: but under the report he became in this Court the purchaser of the inheritance, bound to pay in the whole of the purchase-money: entitled to call upon this Court, in a sense a contracting [339] party with him, as representing all the parties contracting, to deliver out to him the whole inheritance of that estate for that sum. He borrows out of Court the sum of 20,000*l.*; having become in equity the owner of the estate; not borrowing as much as will enable him to buy the estate subject to the mortgage, but that sum of 20,000*l.* to be paid into Court; to the intent, that being added to the sum of 10,500*l.* which he had absolutely paid in, he might have the estate delivered out to him by the Court. Then it was paid into Court for his use upon an agreement between them, that *Cunliffe* shall have a mortgage of the estate, which in equity was *Waring's* at the moment, as soon as it could be given. Suppose at that moment *Waring* had died; could not *Cunliffe* have compelled his representative to get the estate out of Court; to the intent to have a mortgage made to him? Does the Court then, executing the contract, as in *Tweddell* v. *Tweddell*, keep alive the mortgage to the *Trevors*? No: the contract is executed, as it ought to be, by a conveyance of the inheritance. The question is, what *Waring* took; and that is, whatever he took, and *Cunliffe* also. The latter claiming under him as a mortgagee, what he took is only a part of what *Waring* took. The whole inheritance was between them both. The debt to the *Trevors*, as theirs, did not exist after this transaction. It was gone. The debt between *Waring* and *Cunliffe* alone continued to

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exist. In *Tweddell* v. *Tweddell* the original mortgage debt continued. In this instance it did not continue a moment. If it did, this Court could not have executed the contract that conveyed to him the whole inheritance; and in that transaction destroyed the original mortgage debt. That transaction did not create the debt to *Cunliffe*. That was created by paying the money; and the conveyance was only fulfilling that
[340] part of the obligation to make a mortgage of the whole of these premises: whether of the *Ince* estate only, or also including the others, is not material; though the latter circumstance makes it stronger. It is merely fulfilling the obligation he had come under in this Court as equitable owner of the estate.

The conclusion therefore is, that originally this was a personal contract; and the estate a pledge for the further security of that personal contract; that the real contract being only secondary, and the personal being the primary contract, the personal estate must relieve the real estate. I observe in the report (a) Lord *Alvanley* said, he had a strong opinion upon the point; and I have no doubt upon it.

(a) *Ante*, vol. v. 675.

July 17. 19.

Ex parte JORTIN.

An increase of the revenues of a charity applied for the benefit of the charity.

THIS petition was presented under the authority of an Act of Parliament by the patron and trustees of the free school at *Wooton-under-Edge;* stating an increase of the revenues of the charity, to the amount of 60*l.* per annum, in consequence of an exchange and the improved value of the estates; and proposing that the salary of the Master should be increased from 40*l.* to 70*l.* a-year; in consideration, that one of the Statutes required, that he should receive all the boys of *Wooton-under-Edge* upon very low terms; and further proposing, that 2*l.* or 3*l.* a-year should be added to the yearly sum of 5*l.* paid to each of ten boys upon the foundation; or, that the trustees
[341] should be at liberty to apply the surplus in putting boys out apprentices. The salary of the Master, and the number of the boys, and their annual payment, had been increased under a decree upon an information; directing, that the increase of the revenues should be applied in that manner.

The Attorney-General, and Mr. Steele, in support of the Petition.

The Lord CHANCELLOR said, upon all the rules of the Court something must be given to the boys; and made an order, that the salary of the Master should be increased to 80*l.* and the payments of the boys to 6*l.* each. (a)

(a) *The Attorney-General* v. *Tonner, ante,* vol. ii. 4 *Bro. C. C.* 103.

1802.

ROLLS. *February* 18. *July* 19.

BUCKMASTER *v.* HARROP. (1)

To entitle the heir to the performance of an agreement for a purchase out of the personal estate, the agreement must have been binding upon the parties contracting, so that the property was converted in equity before the death.

Sale of land by auction is within the Statute of Frauds; and the name of the vendee being put down by the auctioneer is not sufficient. (2)

Payment of the auction duty is not a part-performance taking an agreement out of the Statute of Frauds.

The ground of the doctrine of part-performance is fraud (3)

ON the 23d of *July*, 1800, certain estates were sold in four lots by distinct particulars; and two agents for *Peter Davenport Finney* were declared the best bidders, at several sums, amounting in the whole to 3119*l.* and they immediately after the sale declared, that they purchased for *Finney;* and *Finney* offered to pay the deposits, 10 *per cent.* and the auction duty, to *Strethill Wright*, the auctioneer; who was also the vendor: but he declined receiving either; alleging, that it was then late at night; and he had to go eight miles: but he told *Finney*, he would lay down the money, and would settle the same * with him some other time; which *Finney* agreed to; and accordingly *Wright* paid the auction duty, amounting to 77*l.* 19*s.* 6*d.* By the conditions of sale the purchaser was to have possession of Lot 3 immediately, and of the other lots at *Michaelmas* next; paying the remainder of his purchase-money upon the execution of the conveyance on or before the 29th of *September*. *Finney* soon afterwards gave the amount of the auction duty to his attorneys, to be paid to *Wright;* directing them to take a proper receipt. He also sold the crops of hay, grass, and oats, then growing on the premises, comprised in Lot 3, for 50*l.* to a person, who afterwards took possession of the premises in that lot. *Finney* died, before the 50*l.* or any rent became due. An abstract of the title was sent to the attorneys of *Finney* about the 15th of *September;* who approved the title; but before any conveyance, on the 22d of *September*, *Finney* died.

The bill was filed by the heirs at law of *Finney* against the executors, the residuary legatee, and *Wright;* praying a specific performance of the contract; and that the purchase money may be paid out of the personal estate.

The answers admitted the agreement. The vendor submitted to perform the contract; and the executor did not object: but the residuary legatee resisted the performance. *Wright* demanded the money he had paid from the executor; but never received it.

Mr. Richards, and Mr. Hall, for the Plaintiffs.—If there [* 342] were no circumstances of part-performance in this case, the question would be, whether the parol contract was void, or not. First, a sale by auction is not within the Statute of [343] Frauds.(*a*) If it is, the auctioneer putting down the name of the vendee is sufficient: *Simon* v. *Metivier.*(*b*) Secondly, it is

(*a*) Stat. 23 *Charles* II. *c.* 3. (*b*) 1 *W. Black.* 599. 3 *Bur.* 1921.

{ (1) Cited and remarked upon, 4 Johns. Cha Rep. 665.}

{ (2) *M'Comb* v. *Weeks*, 4 Johns. Cha. Rep. 659, *contra:* and see *Jackson* v. *Catlin*, 2 Johns. Rep. 248. S. C. 8 Johns. Rep. 520. *Simonds* v. *Catlin*, 2 Caines' Rep. 64 }

{ (3) *Niven* v. *Belknap*, 2 Johns. Rep. 587. 1 Serg. & Rawle. 83.}

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clear, that if the parol contract is admitted by the answer, and the Statute is not insisted on, there is a right to the performance of the agreement; though it is now certainly very doubtful, whether, if the defendant also insists upon the Statute, the Court will compel the performance. (c) In this case a subsisting contract is admitted. An executor is not bound to plead the Statute of Frauds any more than the Statute of Limitations. (1) The heirs at law then have a right to the performance of the contract, admitted by the executors and the vendor. The moment the contract was entered into, *Finney* was in equity entitled to the estate; and continued so at his death. Insisting upon the Statute would disappoint his intention and wishes. These parties are all volunteers; bound therefore by that, which he intended to bind himself.

But if this point should be against the plaintiffs, there is a clear part-performance; which takes this case out of the Statute. Part of the money was paid. Of Lot 3 possession has been taken; and the produce sold. Those acts must amount to part-performance; and the contract is entire. Though the terms are different, all the lots are sold by and to the same persons. *Finney* bought by different agents; who immediately declared themselves trustees. The conditions of sale and particulars relate to a number of lots: but that particular provision as to the possession applies to Lot 3 only; not to the others.

Mr. Martin, for the Defendant, the residuary Legatee.—The [344] sales of these lots were distinct, and independent of each other. The lots were sold under different conditions and particulars. Therefore acts of part-performance as to one could not affect the others. The effect of such acts depends upon the intention, *quo animo;* and the act must be done with an intention to complete the purchase. The act relied upon by the plaintiffs, viz. the payment of part of the money by the purchaser to his own agent, is nothing, unless paid over by him: being in truth paying from one hand to the other.

The Master of the Rolls.—The object of this bill, filed by the coheirs of the purchaser, is to have the contract carried into execution. The vendor submits to perform the contract. The executors do not object to it. But the residuary legatee contends, that there is no contract this Court ought to execute; neither a contract in writing, nor part-performed. It is insisted by the plaintiff, that the residuary legatee has no right to object to the performance of a contract, to which the testator himself had no objection. I am of opinion the Court cannot speculate upon what the deceased would or would not have done: but the inquiry must be, whether at his death a contract existed by which he was bound, and which he could be

(c) See *ante*, vol. vi. 37, in *Cooth* v. *Jackson*.

{(1) See *Walter et al.* v. *Radcliffe*, 2 Desaus. Cha. Rep. 577. 16 Mass. Rep. 431.}

compelled to perform. That alone can give the heir a right to call for the personal estate to be applied, or to the personal representative a right to call upon the heir. Whether the executor would or would not perform it, is of no moment. A mere executor has no right to give away the personal estate from the residuary legatee; who in this case is before the Court; and undertakes to show, the plaintiff has no right to call for a performance of the contract. 1802. BUCKMASTER v. HARROP.

[345] The principle, upon which the Court acts for or against the heir, is stated *(a)* in *The Attorney-General* v. *Day*, and *Lacon* v. *Mertins.(b)* The question must be the same, whether a purchase or a sale is insisted on. Was the ancestor himself bound? Was there such an agreement as converts the real estate into personal, or the personal estate into real? I am of opinion, every objection may be taken upon either, which it would have been competent to the deceased to take, if he had resisted the execution in his life. The plaintiffs say, if it is necessary, and, I am of opinion, it is, they can show, there was such an agreement. First, they say, either a sale by auction is not within the Statute of Frauds; or, the auctioneer putting down the name of the vendee is an agreement in writing; and they cite *Simon* v. *Metivier*. But, whatever is the authority of that case, it has been held not to extend to land. It was twice so ruled by Lord Chief Justice *Eyre*. In *Walker* v. *Constable (c)* and *Stansfield* v. *Johnson (d)* it was held not sufficient that the agent wrote down the name.

The plaintiffs then contend, that the agreement is part-performed as to all the lots; and, if not as to all, as to Lot No. 3. I am of opinion, this is no part-performance. The Revenue Laws ought never to be held to operate, beyond their direct and immediate purpose, to affect the property, and vary the rights of the parties, not within the intention of the act. Upon a sale by auction so much is paid to the vendor as part-payment; and so much to the Government, as tax. If the purchaser refuses to pay the tax, his bidding is void. If he pays it, the only consequence is, his bidding has the same effect, as it would have had, if no such law had been made, and [346] no other. That, without which there would have been no contract, cannot be said to be in part-performance of the contract. The only contract with the vendor, and which I can enforce, is for the price. But, suppose the payment of the auction duty could be considered part of the price: I do not see how that could bind the purchaser. In general the party seeking the performance must show a performance on his side; as a reason for the interference of the Court in his favour; for the ground, upon which the Court acts, is fraud, in refusing to perform after performance by the other party. The inquiry is, whether *Finney*, if so disposed, could have resisted the performance; for, if he could, upon the principle I before

(a) 1 *Ves.* 220. (b) 3 *Atk.* 1.
(c) 1 *Bos. & Pul.* 306. (d) 1 *Esp. Rep.* 101.

1802. stated, the heir is not entitled to call for an application of the personal estate for this purpose. Now, his refusal, after paying part of his purchase money, would be no fraud upon the seller, but his own loss; in this case the loss of the personal estate. *Wright* having advanced the duty is entitled to call upon the executors. In *Lacon* v. *Mertins* the act of part-performance was payment of a considerable part of the purchase-money; and the taking notes was only as a security, in case it should not proceed; and it was held, that, notwithstanding that, it was in part-performance; and therefore it was a fraud to refuse performance on the other side.

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Another act of part-performance was insisted upon here: the circumstances stated by the witness *Barlow* relative to Lot 3. If this were held to be an act of part-performance, it could not affect any other lot; for the several lots were included in distinct articles of sale; and so were unconnected. But even as to this lot, I am of opinion, it is not a part-performance. The bargain with *Barlow* was the mere act of the
[347] vendee. The vendor had no prejudice. He had done nothing to entitle him to say, the non-execution was a fraud upon him. If he had let *Barlow* into possession, that would be an act, by which he might have had a prejudice. All *Barlow* says is, he is now in possession; which cannot be taken to be before *Finney's* death; and nothing, that passed since, could influence the question: the inquiry being, whether at his death he could have been compelled to perform the agreement. I am aware, there are cases that acts done by the defendant can be made a ground for compelling him to perform the agreement: but it is difficult to bring those cases to bear; for, to what do such acts amount, when there is no prejudice to the plaintiff? only to proof of the existence of an agreement. The existence of the agreement may be put out of all doubt by the acts: but the objection upon the Statute, that the agreement is not in writing, remains where it did. The Court does not profess to execute a parol agreement, merely, because it is satisfactorily proved. In *Whaley* v. *Bagenal*, (a) which being before the House of Lords must supersede the authority of every other case, various acts had been done, which implied, that the party had sold the estate, and did not consider himself any longer the owner of it. The question still remained, whether that agreement should be carried into execution; and it was held, that the acts done by the defendant did not entitle the plaintiff to have it specifically performed.

Upon the whole the plaintiffs are not entitled to this relief. The bill therefore must be dismissed, but without costs. The vendor must have his costs from the plaintiffs.

(a) 6 *Bro. P. C.* 45.

1803.

April 4.
May 21.

Ex parte THE EARL OF ILCHESTER. (1)

The Lord CHANCELLOR.
The MASTER *of the* ROLLS.
Lord ALVANLEY, Lord Chief Justice of the Court of Common Pleas.

The proper application to change a guardian is by petition.

The testator, married, but not then having children, gave the guardianship of all his daughters born or to be born to his wife, and of all his sons hereafter to be born to his wife and his brother or the survivor. The guardianship extends to all the children by that or a future marriage.

A second marriage and the birth of children, the wife and children provided for by settlement, and there being children by the former marriage, a case of exception from the rule, that marriage and the birth of a child revoke a will.(2)

Testamentary appointment of guardian not revoked by a subsequent testamentary appointment, not executed according to the Statute, and not directly importing revocation.

THE late Earl of *Ilchester*, being married, but not having at that time any children, by his will, dated the 28th *February*, 1778, and duly executed to pass real estate, after bequeathing a leasehold house in trust for his wife for her life, and giving her all the household goods, furniture, &c. that should be therein, and the sum of 500*l.* to be paid upon his decease, committed the care, tuition, and guardianship, of all his daughters born or to be born unto the said *Mary*, Countess of *Ilchester*, his wife, during their respective minorities; and he committed the care, tuition, and guardianship, of all his sons hereafter to be born unto his said wife and his brother *Stephen Fox Strangways*, or the survivor of them, during their respective minorities. The testator then gave and devised all his estates, subject as to his estates in the County of *Dorset* to a jointure of 1000*l.* a-year to Lady *Ilchester*, to the heirs male of his body begotten or to be begotten, and, for want of such issue, to his brother *Stephen Fox Strangways*, his heirs and assigns for ever; in case he should be living at the time of the testator's decease; and in case he should die in the testator's life, then to his youngest brother *Charles Fox Strangways*, his heirs and assigns for ever; and he gave all his personal estate, * not specifically disposed of, to his said brother *Stephen Fox Strangways;* and appointed his said wife and his brother *Stephen Fox Strangways* executor and executrix.

The testator afterwards made several codicils, giving legacies and various directions. He also left other papers, in his own hand writing, and most of them signed by him, but not attested, entitled "Additional Memoranda;" the first of which, dated *April* 3, 1788, soon after the birth of the present Lord *Ilchester*, is expressed thus:

"I wish, that my friends *Mr. Robert Scott* and *Stephen* "*Digby* would be kind enough to act as Guardians together "with my wife and brother *Stephen Strangways*, to my son "*Henry* or any other sons that may be hereafter born.
"*Ilchester*."

Lady *Ilchester* died in 1790; leaving the present Lord *Ilchester*, her only son, and several daughters surviving.—

(1) Cited 4 Johns. Cha. Rep. 515.

(2) See the note to *Baxter* v. *Dyer*, *ante*, vol. v. 663; *Brush* v. *Wilkins*, 4 Johns Cha Rep. 506, where the *English* cases are reviewed.

1803. *Ex parte* The Earl of ILCHESTER.

After her death he wrote the following memorandum, also unattested.

"1790. In case of any accident happening to me it is my "earnest wish, that my dear sister *Harriet* would take under her "care and protection my unfortunate children. I know it is "a heavy and an anxious task; yet on consideration of the "love she bore their dearest mother and the forlorn and help- "less situation they will be in I am inclined to hope and think "she will undertake it. My dear *Eliza* though young has good sense and heart full of tenderness; and I do not doubt "but she will assist her aunt to the best of her abilities; and "prove a mother to her younger sisters and brother; who will
[350] "need to have the best of principles instilled in him, before "he is sent adrift to a public school. Good principles once "fixed in him will stay with him for ever."

The testator then observing, that his daughters cannot have very large fortunes, there being so many, expressed a wish, that *Harry*, should he have the advantage of a long minority, would add 2000*l.* a-piece to them, if his fortune can prudently bear it; and proceeded thus:

"I mean, he should go first to a small school and after- "wards at a proper age to *Eton*, should that school be then in "good repute. I have requested by dear brother *Stephen*, *Mr.* "*S. Digby*, and *Mr. Scott*, to be his guardians after the time "that my sister shall think fit to give him up; which I should "think would be about the age of ten, or, when he goes to a "public school. I request his guardians would endeavour to "sell *Redlynch* for him, if it can be done to his advantage."

Then followed some other directions and legacies. Some of the other papers also gave legacies and annuities, and directions to his son and the guardians, by the general description "my son's guardians."

In *August*, 1794, the testator married *Maria Digby*. By the settlement on that marriage, dated the 27th of *August*, estates in the counties of *Dorset* and *Somerset* were conveyed to the use of the testator for life; with remainder, subject to a jointure of 1500*l.* a-year, to him, his heirs, and assigns for ever; and by a deed of appointment of the same date, reciting his former marriage settlement in 1781 of an estate in *Somersetshire* upon himself for life, with remainder, subject to a jointure of 500*l.* a-year, to the first and other sons of the
[351] marriage, in tail male, with power to him, in the event of his surviving, to appoint 500*l.* a-year by way of jointure, charged upon that estate to any future wife, he executed that power in favour of his second lady. It was admitted at the hearing, that there was a provision by this settlement for the children of this marriage. By this marriage there was issue two sons, *William Fox Strangways* and *Giles Fox Strangways*.

The last testamentary paper was written and signed by the testator, but not attested; and was thus expressed:

"*December* 8th, 1801. A codicil to be considered as part of "my will.

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"I will, that *Maria*, my present wife, do act as sole and "only guardian to all my children: and do sincerely desire "her to take that trust upon her.

"I do also desire, that she may have my house, gardens, "&c. with the use of the park at *Redlynch* to reside in herself, "if she chooses, for her life; or, if she prefers the house at "*Abbotsbury* for that purpose, then that she should have that "house to reside in herself for her life: if she does not however "reside in either of the houses, that they should be let for "the advantage of my eldest son. If she chooses to reside in "either of the houses, then that house, whichever it may be, "to be kept in repair for her at the expense of my eldest son."

The testator died in *September*, 1802. A petition was presented by the present Lord *Ilchester*, of the age of fourteen, and the other children of the testator, two sons and two daughters, to the Master of the Rolls; praying, that Lady *Ilchester* may be appointed guardian of their persons and estates during their minority; and a reference to consider what it would be proper to allow for maintenance, &c. Upon that petition, the Master was directed to approve a proper person to be guardian of the two daughters; and to state, what relations the petitioners had, and upon what grounds he approved of such guardian: but as to the sons the Master of the Rolls did not think proper to make any order. [352]

Since the date of that order Lady *Ilchester* had issue another son, of whom she was pregnant at the decease of the late Earl; and this petition was presented to the Lord Chancellor by all the sons; praying, that Lady *Ilchester* may be appointed guardian to the petitioners; or that it may be referred to the Master to approve a proper person to be their guardian.

The petition suggested, that the will of 1778 was revoked by the subsequent marriage and the subsequent birth of children; and although the codicils, and particularly that of the 8th of *December*, 1801, might be a republication of the will, yet a codicil containing an express declaration, that a different person from the testator's brother should be the sole guardian, could not operate as a republication of the will, so far as it was a testamentary appointment of guardians; and though the codicil of the 8th of *December*, 1801, could not operate as a testamentary appointment of a guardian, not having been executed in the presence of witnesses, yet it amounted to a revocation of the appointment of the testator's brother; if that appointment was not revoked by the marriage and birth of children.

Mr. Romilly, and Mr. Newbold, in support of the Petition.

The first question is, whether these children have now any guardian. There is a previous consideration; whether a question of this kind can be decided upon petition. But there is one authority in the House of Lords, *Lord Teynham* v. *Barret*, (*a*) mentioned (*b*) in *Eyre* v. *The Countess of Shaftesbury*, (*c*) [353]

(*a*) 2 *Bro. P. C.* 539. *Lady Teynham* v. *Lennard*, 1 *Bro. P. C.* 544 See *Mr. Hargrave's* note, *Co. Lit* 89; *a.* Note 70; and *Mr. Fonblanque's* note, 2 *Treat Eq.* 235. (*b*) 2 *P. Will.* 120. (*c*) 2 *P. Will.* 102.

1803. decided upon petition; and there are also two other instances: *Ex parte Jordan*, (d) and *Ex parte Champney*. (e)

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The first question depends upon two points: 1st, whether the will of 1778 was revoked by the subsequent marriage and birth of children: If not, 2dly, whether the codicil of 1801, though not a good appointment of guardian as there are not two witnesses to it is not a revocation of the former appointment.

If the will of 1778 is revoked by the marriage and birth of children in other respects, the testamentary appointment of guardian must also be revoked. The instrument, if not a subsisting will, cannot under the Statute, (f) giving the father the power of appointing a guardian by deed or will, operate for this purpose. It is extremely difficult to know upon what ground this rule of revocation stands: but, whatever is the ground, it has been considered an established rule of law, subject to some, but very few, exceptions. *Lugg* v. *Lugg* (g) is the first case; which was only as to personal estate; a decision by the delegates; among whom was Lord Chief Justice

[354] *Treby*. It is said, it was much doubted afterwards; but in *Brown* v. *Thompson* (a) it was considered still a rule of law. The question was afterwards discussed in *Parsons* v. *Lanoe*: (b) but it was never decided as to real estate till the case of *Christopher* v. *Christopher*. (c) In *Parsons* v. *Lanoe*, Lord *Hardwicke* expresses approbation of the rule; though according to the report in *Ambler* he doubts very much the application of it as to real estate. But the presumption applies as strongly to real estate as to personal. The different cases put the rule upon very different grounds. In some it is put upon a presumed change of intention. It is difficult to conceive, how the intention to revoke, not actually carried into effect, should have that operation. In *Doe* on the demise of *Lancashire* v. *Lancashire* (d) it is put upon a very different ground, an implied condition. However, this has now been so long considered a rule of law, that there can be little doubt, that testators have often acted upon it; and have not revoked their wills expressly, understanding that to be the rule. Such a rule is understood in the country, as indeed the Statute law is, merely by the manner, in which the law is administered in the country. In the last case, *Kenebel* v. *Scrafton*, (e) it is stated to be now the established, known rule of law. Great inconvenience would follow from establishing a particular exception to the rule merely upon the injustice in a particular case.

Two grounds of objection will be taken: First, the settlement made on the second marriage; providing in some degree for that wife and the children of that marriage. It has not

[355] been decided in any case, that this forms an exception; and

(d) 1 *Dick*. 294. (e) 1 *Dick*. 350.
(f) Stat. 12 *Ch. II* c. 24. (g) 2 *Salk*. 592. 1 *Ld. Raym*. 441.
(a) 1 *Eq. Ca. Ab*. 413. (b) 1 *Ves*. 189. *Amb*. 557.
(c) In the Court of Exchequer, *July* 6th, 1771. See 4 *Bur*. 2171. 2182. *Doug*. 35. (d) 5 *Term Rep*. 49. (e) 2 *East*. 530.

there is the great authority of Lord *Hardwicke* in *Parsons* v. *Lanoe* against it. If it depends upon the settlement, it must depend in a great degree upon the kind of settlement. The exceptions to the rule, if this is to be laid down as a rule of law, with exceptions, ought to be as clear and intelligible as the rule; and it would be very extraordinary, if it is to depend on the nature of the settlement.

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The other objection is, that no case has yet occurred, in which a second marriage and birth of children by the second wife, there being also children by the first marriage, have been held a revocation. There is no such case: but a second marriage, with children, there being no children by the first marriage, was decided to be a revocation in *Christopher* v. *Christopher*. *Gibbons* v. *Caunt (a)* was under circumstances something like these: but the question certainly was not decided. Some doubt was expressed by Lord *Alvanley;* but certainly the inclination of his mind was, that the second marriage would be a revocation. But how is the exception to be framed? Not upon the circumstance that there are children by both marriages; for suppose, before the death of the testator, all the children by the first are dead: there is just the same reason, as strongly applicable: the same alteration of circumstances occurs: the testator dying with quite a new family: that new family in existence the only persons having strong claims upon his bounty; all the others being removed. That exception therefore must admit of this exception out of it; introducing all the inconvenience of exceptions grafted upon exceptions. A rule of law ought to be laid down without reference to particular cases; for there can be no rule, [356] that will not be liable to some cases of inconvenience. In *Kenebel* v. *Scrafton* the Court seem to have attended very much to the particular circumstances. A case might be put upon that, in which it would be quite clear, that decision would have frustrated the intention; as, if it had happened, that there were many children born before the marriage, and only one born after: all the children born before marriage must have been unprovided for: legitimate children only taking under the description of children. *(a)*

But the strongest ground for submitting, that there is not at present any testamentary guardian of these petitioners, is the other; that the instrument of 1801 is a revocation of the appointment of their uncle. Upon the birth of the eldest son the testator seems to have changed his intention; and from the paper written soon after the death of the first Lady *Ilchester* a clear intention appears at that time, that his brother and the other persons should not be guardians till the period to which he points. The Statute is entirely silent as to the manner in which a will appointing a guardian may be revoked. There can be no doubt, that, if the Statute of Frauds *(b)* had

(a) *Ante*, vol. iv. 840.

(a) p. 356. *Cartwright* v. *Vawdry*, *ante*, vol. v. 530.

(b) Stat. 29 *Ch. II.* c. 3.

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not interfered, a will devising land might be revoked without witnesses. This is analogous to the cases upon the Statute of Wills,(c) before the Statute of Frauds. In that period the will, though it must have been in writing, might have been revoked by parol; and there are many cases in *Roll's* Abridgment,(d) *Dyer*,(e) *Sheppard's* Touchstone and other books.
[357] It is very difficult to distinguish that from this: but in *Onions* v. *Tyrer*(a) something is said by Lord *Cowper*, upon which an objection will be taken; that, even if by the latter will the premises had been given to a third person, it should never have let in the heir; as the meaning of the second will was to give to the second devisee what it had taken from the first, without any consideration had to the heir, &c. The decision was not upon this ground. By the Statute of Frauds a will may be revoked either by a subsequent will or other writing. In that case it was impossible to consider the subsequent instrument as a mere writing of revocation. If it was not a revocation, as being a will, it was no revocation. It was not a will; not being attested, as the statute requires. Neither of the modes pointed out by the statute, which by the latter expression must mean a formal revocation and nothing more, was followed. The reasons of the decision are very fully stated in the decree itself.(b) Upon some cases there is great reason for doubting the authority of that decision; unless it proceeds upon the distinction in the Statute of Frauds(c) between a will and any other writing: but the reason, upon which that must proceed, cannot apply to this case. From a devise by the second instrument to a different person the inference is, that another person had by some means acquired higher claims upon the bounty of the devisor; and that he preferred that person: but it is very difficult from thence to infer any intention in favour of the heir. That would be a very strong inference.

A testamentary guardian exists only by the act of the tes-
[358] tator under the Statute of *Charles* II. He has very important powers; that may influence the happiness of the ward all the rest of his life; among others, that of preventing marriage under the Marriage Act.(a) Suppose such a change of circumstances in this long period, twenty-three years, making the party the most unfit person to be the guardian; and another instrument is made, absolutely excluding that person; and declaring, that another person shall be sole guardian: that cannot stand upon the same ground as a disposition of real and personal estate; for there is no one, upon whom that duty will devolve. There would be no testamentary guardian, if the latter appointment could not take effect: nor could the Court substitute one; for, though the Court may appoint a guardian,

(c) Stat. 32 *Hen. VIII.* c. 1. 34 *Hen. VIII.* c. 5.
(d) 1 *Rol. Ab.* 614. (e) *Dy.* 310.
(a) p. 357. 1 *P. Will* 343.
(b) Stated from the Register's book by *Mr. Cox*, 1 *P. Will.* 345, note.
(c) Sect. 5 and 6. (a) p. 358. Stat. 26 *Geo. II.* c. 33.

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he will not have the powers of a testamentary guardian. The consequence, in the case of a devise of real estate, that the testator would give to a person to whom he does not mean to give, does not apply to this case; and that case before Lord *Cowper*, therefore, can have no application. But, if it had, how can it be distinguished from the case of a devise of land to a person who cannot take, revoking a former devise; as in the instances in *Roll's* Abridgment *(b)* of a devise to a corporation, *Roper* v. *Constable*, *(c)* *Roper* v. *Radcliffe (d)*; which went to the House of Lords upon another point; the parties acquiescing in this? *Hawes* v. *Wyatt (e)* is in opposition to *Hick* v. *Mors*: *(f)* but that case was not cited upon the former. *Hyde* v. *Hyde*. *(g)* *Shove* v. *Pincke*. *(h)* *Beard* v. *Beard*. *(i)* The principle upon which all these cases were decided, is directly applicable to this; that, though the second instrument cannot take effect as a will, yet it is a revocation; and it is [359] much stronger in this instance; upon which your Lordship has not to determine between different claimants, as devisee and heir at law, or legatees and next of kin; but merely, whether a testamentary appointment of guardian exists. It is clear, that in 1788 the testator did not intend his brother to be sole guardian; and as clear, that in 1801 he was not intended to have any part of the guardianship. No particular form of revocation is necessary: *Lord Shaftesbury* v. *Hannam*. *(a)* *Cranvell* v. *Sanders*. *(b)* As the appointment is sufficient, provided the intention is sufficiently apparent, so is the revocation. In *Burtenshaw* v. *Gilbert (c)* Lord *Mansfield* states another ground for Lord *Cowper's* opinion in *Onions* v. *Tyrer*, viz. that the cancelling was by mistake. Your Lordship will not for the first time throw any difficulty in the way of the revocation of so important a trust; and will also consider the feelings of the children, placed under the guardianship of a person, appointed twenty years ago, against the plain intention of their father.

Another question is, whether the appointment ought to be immediate, or by a reference to the Master. The Court has in many cases appointed in the first instance the person pointed out by the testator; and it is the stronger; as in this instance the intention fails only by want of form; otherwise there would be a good appointment under the Statute.

Mr. Richards, and Mr. Fonblanque, against the Petition.

A petition is the proper mode; and preferable to a bill.

Upon the first point, it is certainly too late now to dispute [360] the cases that have established this rule of revocation; which, however, is improperly called a rule; being only a presumption of facts forming an exception, not within the direct words

(b) 1 *Roll's Ab.* 614.
(c) 8 *Vin.* 141.
(d) 10 *Mod.* 233. 1 *Bro. P. C.* 450.
(e) 3 *Bro. C. C.* 156.
(f) *Amb.* 215.
(g) 1 *Eq. Ca. Ab.* 408.
(h) 5 *Term Rep.* 124. 310.
(i) 3 *Atk.* 72.
(a) p. 359. *Finch*. 323.
(b) *Cro. Jam.* 497.
(c) *Cowp.* 49.

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of the Statute of Frauds; but a revocation implied, either upon the ground of the total change of circumstances, inferring a change of intention, or upon an implied condition, that in certain events that will was not to operate. This presumption has always given way in two cases: where there are children by the first marriage; and, where a provision is made for the children by the second: *Thompson* v. *Sheppard:* (a) *Gray* v. *Altham:* (b) *Jackson* v. *Hurlock;* (c) and, according to Lord *Mansfield* in *Brady* v. *Cubitt*, (d) there must be a further requisite to raise it; that the disposition is of the whole property. The question is not, whether your Lordship is to act upon the rule, but to extend it to a case never yet decided. The testator had the wife and children in contemplation. By the settlement made on the second marriage he makes an anxious provision for that wife and those children; a settlement ample enough to rebut the presumption. The very act of the settlement takes away *pro tanto* the provision for the children of the first marriage; and transfers it to those of the second. Can the act be said to be a revocation, when a provision is made for those objects, in whose favour the revocation is to be presumed? The *quantum* of the provision is a circumstance, to which the Court will not look. It is alarming to extend this to the case, where there are children by the first marriage. Suppose the provision made for the younger children, not for the eldest only: the consequence would be that the eldest would take the whole estate, discharged from [361] any provision charged upon it for the other children; and the father might have no personal estate. It might also destroy the provision for the children by the second marriage. The rule must be carried to this extent; and there is as little principle as authority for thus extending it. Suppose a father with seven or eight children, not expecting any more, disposes of his property among them by will; and afterwards marries again; and has another child. He must be taken to mean, that the child of the second marriage should partake with the others; and this doctrine must be carried to the extent, that, whenever a circumstance happens, upon which it would be clear, that he would have made a different provision, the will is revoked. Suppose there were daughters only by the first marriage, provided for by the will; and a second marriage takes place, and the birth of a son by that marriage: that accident would sweep away the provision for those equally objects of the bounty and the duty of the parent. The presumption cannot with any attention to justice be carried further.

Upon the second question it is contended, that the codicil, though inoperative for the purpose of substituting a guardian, is operative for the purpose of revocation. The Statute of Wills does not point out any ceremony, but merely a writing,

(a) *Amb.* 490. Margin. (b) Cited *Amb.* 490.
(c) *Amb.* 487. (d) *Doug.* 30.

to denote what the testator meant to do with his property; and it was held, that a very slight matter, writing certainly, would revoke a testamentary disposition: and further, that even parol declarations would amount to a revocation. It is to be remembered, that this codicil is a mere paper-writing, not under seal, not executed with any solemnity. At this moment any interest in a mere paper-writing without seal may be waived by parol; an agreement for instance: but if under seal it could not be done away without seal. The object of the Statute of Frauds was not merely to authenticate the instrument, but to secure its effect, when authenticated; and [362] that object would be much endangered, if the validity of the instrument was to depend upon a change of purpose, evidenced by parol. In this instance the Statute expressly requires the presence of two witnesses. Why should it be undone without the same solemnity? Can it be compared to cases upon the Statute of Wills, requiring no solemnity? Where is the principle for undoing such an appointment without some form? No authority is produced. There is great reason for requiring, that it should be with two witnesses, the ceremony required for giving life and activity to the intention appointing. Your Lordship is called upon for the first time without any authority, affording even analogy, to decide, that an act, undisputably good according to the Statute, shall be avoided by what merely shows the private intention. That opinion of Lord *Cowper* is right; and has been followed. The testator clearly intended to take from the first and to give to the second devisee; and, that the heir should not take. It follows then, that the old will, which was revoked only to let in the other, must stand; as if the revocation had been only for one purpose; which fails entirely in form and substance. In *Limbery* v. *Mason* (a) the same principle prevailed. In the cases referred to, a devise to a person, who cannot take, &c. the instrument is complete; the intent perfect: but the law will not allow it to be carried into execution. It does not fail from any defect of the instrument. In the cases of imperfect conveyances the instrument is perfect at the moment; the bargain and sale is good till the end of the six months: so upon a feoffment, when livery is made, the estate passes out of the feoffer from the execution of the deed. The instrument is perfect; and the intention, that the first devisee should not take, is complete. In this case, where the supposed intention was not completed, [363] the instrument was never perfect, and the interest has never shifted, why should it go, as if there was no appointment? As to the inconvenience, that a person appointed guardian twenty years ago might not now be a proper guardian, cases of inconvenience may be put for ever; as upon a devise not executed according to the statute the estate may go to a person, to whom the testator had the greatest reason not to give it. If the act is not sufficient in law, the inconvenience

(a) *Comyn's Rep.* 451, cited 4 *Bur.* 2515.

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must follow. The Court cannot control the appointment of an improper guardian; though they may control his conduct. When the Court is in possession of a will duly appointing a guardian, why should they receive evidence short of that, which is required for an appointment? The purpose was the protection of these children. The testator might have intended to clothe this guardian with powers, which your Lordship could not give to any other guardian. Before those powers, to which he intended to subject his children, are reduced, your Lordship ought to be satisfied, that there was a change of that purpose, by evidence rising as high as that by which it was proved.

Upon the last question, whether your lordship would appoint a guardian now, or upon a reference to the Master, there is no instance of an appointment in the first instance, except in the case of natural children; and a reference is particularly proper, where there has been an attempt to appoint by an imperfect instrument.

Mr. Romilly, in Reply.—Scarcely any question has been brought into more doubt, than whether parol evidence can be received to rebut this presumption. Lord *Alvanley's* opinion
[364] in *Gibbons* v. *Caunt* is against it, and Lord *Rosslyn's* (a) in *Kenebel* v. *Scrafton;* and the Court of King's Bench declared, it was unnecessary to decide that question. Where is this rule of law found, as confined to children by the first marriage? The claim upon the parent applies just as much to the other case. Those, who endeavour to establish an exception to the rule, ought to produce authority; as they do not attempt to go upon principle. The rule has been laid down as to marriage generally, without reference to the first or second. *Thompson* v. *Sheppard* cannot be considered an authority; the circumstances not being at all stated. The same objection applies to *Gray* v. *Altham*. I admit, the rule is laid down, that the will must dispose of all the property; and this is a disposition of the whole, both real and personal. It is now of importance to know, what the settlement was; for many settlements might put an end to all question: if, for instance, it was a covenant that the testator should be considered a freeman of *London*. Suppose a testator, having disposed of all his property, should marry a woman with very little property; and he should settle that: would that prevent the revocation? Every presumption would exist as strong. Is it not better to follow the rule without ingrafting particular exceptions upon it?

As to the second point, there is no rule of law, that an instrument cannot be revoked without the same forms, that are necessary to give it validity originally. The Statute of Frauds proceeds upon the presumption, that there is no such rule; having a clause, expressing, that the devise shall not be revoked without three witnesses. The clause as to nuncupative

(a) *Ante*, vol. v. 664.

wills *(b)* also proves, that but for that express provision a will in writing might be * revoked by parol; and the same conclusion follows from *Onions* v. *Tyrer*, and *Eccleston* v. *Speak*. *(a)* So an agreement relating to land may be determined by parol; and the writing only is necessary for that, and not attestation also. If the form can be dispensed with, it is not material what that form is. It is doubtful, whether a revocation of an appointment of guardian must be by a testamentary act; or whether a testamentary appointment must be proved in the spiritual Court. In *Lady Chester's* case *(b)* a prohibition was granted. The intention in none of the cases was to give to the heir, but to revoke only for a particular purpose; which could not take effect: yet the estate went to the heir. The only decisions against those are *Eccleston* v. *Speak*, and *Onions* v. *Tyrer;* in both which the estate was devised by the second will to the same person; and the intention was only to carry it into effect more substantially. So in *Limbery* v. *Mason* the intention was not to defeat the first will, but to do the same thing more completely; and the Court would most reluctantly have determined against the intention. An appointment by deed may be revoked by will. *Lord Shaftesbury* v. *Hannam*. *(c)* [* 365]

The Lord CHANCELLOR.—If the points upon this petition had been confined to that which arises upon the second marriage, and the birth of children by that marriage, under the circumstances, in which that marriage and the birth of those children took place in this particular case, notwithstanding that question must have been determined, not merely with respect to this matter of guardianship, but must have had relation to, and effect upon, the property of this family, which I [366] take to be considerable, I should not have been justified in giving *The Master of the Rolls*, and *The Lord Chief Justice*, the trouble of attending upon that point; for I had no considerable doubt at first, nor has that been increased since, that the second marriage and the birth of children by that marriage should not, under all the circumstances, be taken to be a revocation. My opinion is, it ought not to be so considered. I am happy to find *The Master of the Rolls* and *The Lord Chief Justice* concur with me upon that; and, without stating any opinion upon the cases that have been cited, I may state the sentiments of us all to be, that, where a testator stands in the circumstances which appear in this case, with regard to the children of the prior marriage, and the circumstances in which he placed himself as to the children of the second marriage, this case forms a case of exception. I do not go further; for it is too obvious from what has since passed, that from the rule originally adopted and now settled, whether to be considered a rule of law or a presumption, whether going upon the intention or an implied condition, those difficulties have arisen, which some judicial persons, one in particular, foresaw. I think it better therefore to confine the opinion in these

(b) Sect. 22.
(a) p. 365. 3 *Mod.* 258. *Show.* 89.
(b) p. 365. *Vent.* 207.
(c) *Finch.* 323.

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terms; that under all the circumstances of this case, this appointment is not revoked by the subsequent marriage and birth of children.

The point upon which we wish to take a little time to consider is the other; whether this codicil, most clearly demonstrating, that, to the extent of effectuating the special purpose, the testator meant to revoke the appointment by the will, but being incomplete for the effect of appointing a guardian, shall be sufficient to revoke the appointment of a guardian by testament. That depends upon two points: first, whether the want [367] of two witnesses would have made it ineffectual, even if this codicil upon the face of it proposed a purpose of revocation in all events: Secondly, if not professing that general purpose of revocation, whether the circumstance of expressing a special purpose will make it ineffectual as to that appointment, because ineffectual to accomplish that special purpose. That will depend upon the points very ably put in the argument. The question takes this turn; whether as it is necessary under the Statute that the instrument, whether a deed, which I take to be only a testamentary instrument in the form of a deed or a will, should be executed in the presence of two witnesses, the Statute not using the same expression as the Statute of Frauds, it is therefore also necessary, that any instrument revoking that shall be executed in the presence of two witnesses. It is argued that it is not necessary; but that any thing that can be admitted as evidence of a change of intention is sufficient; though by an instrument not attended with the same forms and ceremonies as the original instrument. That is said to follow from this, that the Statute of Wills would admit of a parol revocation if the Statute of Frauds had not been made; and upon the latter Statute many cases are to be collected in which certain ceremonies are prescribed as necessary to the creation of an instrument, which may be destroyed without those ceremonies. With respect to the difference between the 5th and 6th sections of that Statute it may be observed, that a will is made revocable by a great variety of acts. The three witnesses are all witnesses to the sanity, as well as other circumstances. But he may obliterate or cancel the will in the presence of no one; or if before a single person, his proof will destroy the will: yet there is not the same guard. The argument is worthy attention, that, if that clause had not directed that a revocation in writing should be with three witnesses, it [368] would have been inferred without those circumstances of attestation. Upon agreements and in other instances the Statute affords inferences for the same point.

May 21. Lord *Alvanley*, Chief Justice, stated the case; and delivered his opinion:

The questions are, First, whether the will of 1778, giving the guardianship of the daughters of the late Earl of *Ilchester* to his first lady, and of his sons to her and his brother, or the survivor, must, according to the true construction and legal effect of that clause, be restrained to the children of the mar-

riage at that time; or whether it extends to all the children he might have by that or any future marriage: next, whether, supposing all are included, the paper signed by the testator in 1801 has revoked the appointment of guardian by that will.

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If I was at liberty to indulge conjecture, I should certainly be apt to suppose he had not in his contemplation any future marriage. I have read this will with an anxious desire to satisfy myself that I could state to your Lordship as my judicial opinion, that it would admit of the restrained construction: but upon the rules and principles that I have ever thought it my duty to observe in the administration of justice, I have ever thought it imposed upon me not to make any intendment contrary to the plain and usual sense of the words used, unless from other parts of the will I could plainly see that the testator could not have intended them to have that extensive operation the words themselves could carry; and upon this will and all the other instruments, if I can take them into consideration, I cannot see any decisive inference that, necessarily and unavoidably, this testator must have meant to restrain the guardianship to the children of his then wife. It cannot be denied * that the survivorship as between the brother and the wife was not confined to a survivorship to commence after the testator's death; for it is clear, though the wife died before him, the brother would have been the guardian of any sons by his deceased wife. It cannot therefore be construed "provided they both survive." The word "survivor" must have its natural meaning; viz. whether both survive him, or only one; and though, considering it as the case of a wife, it must be supposed that the testator had not in his contemplation any sons but those of that marriage, yet it has been repeatedly determined, and is not to be departed from, that though he might not have contemplated the event that happened, yet that will not affect the construction. I cannot illustrate it better than by supposing that he had accompanied the guardianship by a bequest to any sons he might have: then all the inclination of the Court would be to include after-born sons; which proves the impropriety of being swayed against the natural import of the words by arguments that probably correspond with the intention. I must therefore reluctantly declare my opinion, that in point of law this clause extended to all the children either by that or any future marriage; and is not to be restrained to children by that marriage only.

Rule of construction not to make any intendment contrary to the plain and usual sense of the words, unless from other parts of the will plainly appearing not intended to have that extensive operation.

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Though the testator might not have contemplated the event, that will not affect the construction.

Your Lordship having disposed of the question, whether the subsequent marriage and birth of children effected a revocation, the next question is, whether the testator's brother being as the survivor constituted by this clause the guardian of all sons by that or any future marriage, the paper-writing of the 8th of *December*, 1801, is a revocation of that clause. That paper was made after the other papers, pointing to the guardianship he supposed to exist; intimating either that he had given the guardianship, or, that he intended by some sufficient instrument to confer it. He unfortunately neglected to procure this codicil to be attested by two witnesses; and the [370]

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question is, whether, notwithstanding it will not have the effect of giving the guardianship to Lady *Ilchester*, it nevertheless operates as a revocation of the clause in the will creating the guardianship in his brother, the survivor of the two persons appointed. This will in a great measure depend upon the determinations as to wills of land. It is clear by the common law a man could not by any testamentary disposition affect either his land or the guardianship of his children. The latter appears never to have been made the subject of testamentary disposition till the Statute 12 *Charles* II. It is impossible to contend, that it was comprehended under the Statute 32 *Henry* VIII. Till that time as to land, and as to guardianship till the later Statute of *Charles* II. the law pointed out the person to succeed; and it was incompetent to the party by any testamentary act to alter the succession of the person to inherit the real estate, or, whom the law pointed out as guardian; whether the party died intestate or not. Very soon after the Statute authorizing devises of land, the question arose what sort of testamentary acts would be sufficient to revoke them; and it was soon determined, that an act inconsistent with the will, though by some accident, independent of the instrument, it failed of effect, yet produced a revocation. Therefore upon a covenant to make a feoffment to the use of the covenantor and *Mary*, the daughter of the covenantee, whom he intended to marry, which covenant was executed by letter of attorney to make livery, and livery was made of one manor, but not of the other land, it was contended in *Montague* v. *Jeffereys*, (a) that as the intention of feoffment would not have full effect for want of the livery, the devise was revoked only as to the manor. The * book says, it seemed, (that is the expression,) to the Court a countermand of the whole. My opinion is, that is right; for there was no defect in the instrument making a different disposition. That was complete; if the act had been done after the execution. The party made the letter of attorney, authorizing a person to do the act, which would have made it complete; and that has been determined since the Statute of Frauds to be a revocation of a will of lands according to the Statute. Upon the question as to parol revocations, a great number of cases are alluded to in *Roll's* Abridgment: (a) in which the question has been determined, in a manner forbidding your Lordship to say they are wrong, that if there is a devise according to the Statute, and a revocation by parol in the presence of certain persons, and the testator says, that, when he comes to *D.* he will alter it, and before he comes to *D.* he is murdered, it is a revocation, though not in writing. The great question has been, whether inchoate acts, inconsistent, shall revoke: but in all the cases it is admitted, that if the act gives power to destroy the will, though the act is

By the Common Law a man could not by testamentary disposition affect his lands or the guardianship of his children

An act inconsistent with the will, though by some accident, independent of the will, it fails of effect, is a revocation; as a covenant to make a feoffment and letter of attorney to make livery; but no livery made.

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Parol revocation of will before the Statute of Frauds. (1)

(a) *Moor*, 429. 1 *Rol. Ab.* 615. (a) p. 371. 1 *Rol. Ab.* *614.

{ (1) See *Jackson* v. *Kniffen*, 2 Johns. Rep. 31. *Havard* v. *Davis*, 2 Binn. 406. 2 Munf. 209. 2 Dall. 289.}

not done, yet the will is revoked. I collect then, that previously to the Statute of Frauds or the Statute of *Charles* II. as to guardianship, any declaration, from which an intention to revoke could be collected, would have been sufficient, equally as if it was in writing. That continued as to land down to the Statute of Frauds. But the Statute 12 *Charles* II. intervened. It is extremely material to observe the words of that Statute; for it is necessary to contrast them with those of the Statute of Frauds. Nothing appears to have arisen, bearing upon this question in point of the construction of this Statute as to the power of revocation by parol, prior to the Statute of Frauds. The words of that Statute as to devises of land are much more extensive * than those of the Statute 12 *Charles* II. The words in the Statute of Frauds, (a) "or "else they shall be utterly void and of none effect," are the foundation of those determinations, which have in subsequent times worked so much injustice; that wills not executed according to the Statute have no operation; not even to raise an election against a person taking a benefit in the personal estate. Those words do not occur in the Statute 12 *Charles* II. The difference between the 5th and 6th Sections of the Statute of Frauds is most singular; and, if I am at liberty to impute mistake to the Legislature, it is hardly possible not to suppose it in this instance; and to imagine, that they meant to institute one sort of revocation, so nearly approaching, and not exactly conformable, to the mode of disposition prescribed. But this is demonstration, that by the Common Law an act might not be sufficient to give, that might be sufficient to revoke: the Legislature specifying, what shall be sufficient to revoke. It was enforced at the bar, that if that clause of revocation had not been inserted, a parol revocation might have been sufficient even after the Statute; and this is legislative authority, that a revocation need not have been accompanied with all the sanction of disposition; especially when the sanction prescribed differs from that, by which a disposition is to be made.

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Previously to the Statute of Frauds and that as to guardianship, any declaration, from which an intention to revoke could be collected, was sufficient.

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A will not executed according to the Statute of Frauds has no operation; not even to raise an election against a person taking a benefit in the personal estate.

Difference between the 5th and 6th Sections of the Statute of Frauds.

A great number of decisions have been made upon revocation since the Statute; and from *Eccleston* v. *Speak* and *Onions* v. *Tyrer* it has been held, that, where a disposition is made, so as to have legal effect, and afterwards another, by which the former would be revoked, * but the other substituted, and it is evident, that the testator, though using the means of revocation, could not intend it for any other purpose than to give effect to another disposition, though, if it had been a mere revocation, it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation. In those cases the testator, so far from intending to revoke, only took other means of carrying the purpose into effect; for in both the uses were the same. In *Onions* v. *Tyrer* the Lord Chancellor thought it necessary to express in the decree the

Disposition by will, so as to have legal effect, and afterwards another, by which the former would be revoked, but the other substituted; and it is evident, the testator did not intend revocation for any other purpose than to give it effect, if the second instrument cannot have the effect of disposition, it shall not be a revocation.

(a) Sect 5.

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reasons; which is very uncommon now; and was not usual even then. (1) The essential circumstance in those cases is, that the disposition was the same; and therefore they do not go the length of this case.

Where the act is valid for the whole purpose, but by disability of the person to take, or some matter *dehors* or subsequent to the will it is ineffectual, it is a revocation.

There are many other cases, of a different sort; where the act done was set aside: the act in itself upon the face of it being valid for the whole purpose: but by some circumstance, either disability in the person to take, or some matter *dehors* or subsequent to the will, it was ineffectual; and then upon the principle of *Montague* v. *Jeffereys* it was a revocation. *Beard* v. *Beard* (a) is a case of that sort. There are two cases, *Hawes* v. *Wyatt* and *Hick* v. *Mors*, which do not bear much upon this question: but as the decree in *Hawes* v. *Wyatt* was reversed, and as the great authority of the noble Lord, who reversed that decree, may be brought in some degree to bear upon this subject, I shall make some observations upon them. In that case the son after the disposition went abroad. During his life he never intimated any intention to quarrel with it. The bill was filed to set it aside upon the exertion of parental [374] authority, such, that this Court would not permit an instrument so obtained to stand; and I was of opinion, that the deed could not operate against the heirs of the son: yet I was of opinion, it would revoke the will; for the son thought it absolutely revoked; and therefore to permit it to stand would be against the principle. Lord *Thurlow* differed upon that: but I believe *Hicks* v. *Mors* was not then adverted to. But now there is the authority of Lord *Hardwicke*, that such an instrument is sufficient to revoke a will.

A will may be revoked by an instrument, not attested as would be required, to give it effect. Any disposition, that would by the instrument have completely put an end to that will, shall have that effect, though the instrument becomes ineffectual by any accident or circumstance *dehors* the will.

Those cases afford these principles; that a will may be revoked by an instrument not attested, as would be required in order to give it effect; that any disposition which would by the instrument in question have completely and entirely put an end to that will, shall have that effect; though the instrument by any accident or circumstance *dehors* the will becomes ineffectual; as in *Beard* v. *Beard*, and *Roper* v. *Radcliffe*; as if the person becomes incapable of taking. *Shove* v. *Pincke* (a) struck me at first, and according to the margin of the report it seems, as if the Court had almost determined the question. The point argued by Serjeant *Shepherd* is, that there was no power to make the deed; and as the deed was in itself good for nothing, it was not a revocation. The counsel on the other side was stopped. By the judgment and certificate, it is clear, the Court did not intend to decide that question; but determined upon another question: viz. that the deed was not null and void; but operated as a covenant to stand seised to uses. This puts that case entirely out of the question; for it was not determined on this ground. The certificate, independent of the reasoning, is decisive, that this question did not arise; and there is nothing in the judgment or the reasons, [375] from which it is to be collected, that they determined upon

(a) 3 *Atk.* 72. (a) p. 374. 5 *Term Rep.* 124. 310.

{ (1) See *Dey* v. *Dunham*, 2 Johns. Cha. Rep. 194, and the decree in that case. }

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that ground, except in the preamble of Lord *Kenyon's* judgment; where the words are certainly extremely wide; and in their widest sense would embrace this question. But his Lordship clearly decides, and certifies as the ground of the decision what shows, that this question never arose; viz. that the deed was valid as a covenant to stand seised to uses. There is therefore no authority in the way of this proposition; that an instrument, imperfect to the point to which it is directed, shall operate as a revocation of a will duly attested.

Principle, upon which instruments not duly attested according to the Statute of Frauds are rejected, and even one part may have effect, as to the personal estate, though not as to the real; not even raising a case of election.

As to the principle, upon which the Courts are at liberty to reject all instruments not duly attested, by which wills may be revoked or altered, and even to permit one part of the instrument to have effect, as to the personal estate, though not as to the real estate, that must proceed upon this; that wills of land or guardianship requiring to be attested in a particular manner, if the testator leaves an instrument, which cannot have the effect of giving the land, but is sufficient to give personal estate, the person entitled under it may claim the personal estate; and if he is heir, he may take the real estate; only upon this ground; that if a person having power to give by a certain mode has executed that power, and afterwards disposing by a mode not effectual, and having no operation, until accompanied by certain solemnities, neglects to add those solemnities, the Court can consider that instrument only as an intimation of what he would do; and not having consummated it by the solemnities required he leaves it an inchoate act, not competent to any purpose whatsoever. Those are the principles, upon which a will, rejected totally as to one part, not even raising a case of election, and effect being given to it as to the other, upon the clause in the Statute of Frauds, declaring the will null and void, must proceed; and though those words are not contained in the Statute 12 *Charles* II. yet it requires that the will must be executed in the presence of two witnesses. But I admit, that, if the object of this instrument was to revoke, though it was not sufficient to give the guardianship to another, it must have had that effect. But the object was to make a new guardian; which was attempted by an insufficient instrument, not sufficient to revoke the appointment of guardian, and not effectual to appoint another. [376]

My opinion therefore is, that the writing, dated the 8th of *December*, 1801, is not sufficient to revoke the will, so far as it is an appointment of the testator's brother as guardian, as surviving the first Lady *Ilchester*.

The Master of the Rolls.—The first point having been already disposed of, with respect to the second, the codicil, said to be a revocation, though not a valid appointment of a new guardian, the Statute of *Charles* II. authorizing a father to appoint a guardian by deed, executed in his life, or by will with two or more witnesses, is silent as to the manner, in which such appointment may be revoked. But it has been contended against this application, that, as a solemnity is prescribed for the appointment, the revocation ought to be authenticated by

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The rule of the Civil Law required the same solemnity to annul an instrument, that was necessary to its completion: relaxed by *Justinian* in certain cases as to the revocation of a will.

The rule never adopted in its full extent in this country.

Parol revocation of a will good before the Statute of Frauds. Parol revocation of agreements. Different solemnities by that statute for the framing and the revocation of wills.

a solemnity of the same sort. The civil law, proceeding upon the rule, "*nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatum est,*" required the same solemnity to annul an instrument, that was necessary to its perfection. Till the time of *Justinian* seven witnesses were required to the revocation as well as the completion of an instrument. That Emperor decreed, that in certain cases a mere revocation might be with three witnesses. But the rule was never adopted in its full extent in this country in opposition to the former *rule. The Statute of Wills prescribed writing: yet it was held, that a parol revocation was sufficient. It is determined, that agreements in writing, and required by the Statute of Frauds to be in writing, may be determined by parol; and it is observable, that different solemnities are required by the statute for the framing and for the revocation of wills. I should therefore have been of opinion, that, if the professed object of the codicil had been only a direct revocation, that object would have been accomplished, though without two witnesses. But this instrument has no words of direct revocation, nor any other indication of an intention to revoke than by an attempt to make a new appointment. It is contended, however, that the intention so indicated ought to prevail; and that the codicil, though not effectual as to the appointment of the guardianship, constitutes a revocation, and if an intention absolutely to revoke the first appointment could with certainty be collected from the design to substitute another guardian, it ought to be held a revocation of the first appointment; for if I am right, the Court has before it an instrument capable of operating as a revocation, if a revocation be contained in it; as it would, if the intention was sufficiently manifested. There can be no doubt, that part of the intention was to revoke the appointment; otherwise Lady *Ilchester* could not be the only guardian. But the question is, whether that was the substantive, direct, object, or only as an incidental and necessary part of the ultimate object; and whether it would ever have been entertained except with a reference to that. A new devise might be expressed so as to show absolutely and at all events an intention to annul the former; as if he showed a dislike of the person first appointed. That might show an intention absolutely to revoke. But, where there is nothing but the mere fact of a new devise, the intention to revoke can be considered only with reference to the new devise, and as the testator means to give effect to it; and if the instrument is so made as to be incapable of operating, I cannot conceive how an instrument, inoperative to its direct purpose, can give effect to an intention, of which I know nothing but by that purpose. I know nothing of this intention but by the manifestation of the other. There is no legal certainty. The Statute has prescribed the mode, by which alone the intention to appoint a guardian can be effectually shown. If that is not pursued, he does not furnish complete evidence of his intention. Upon a devise of land by an unattested will no notice can be taken of the intention, so as to raise a case of election.

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The answer is, it is not competent to him to express an intention as to land by such an instrument. The cases of feoffment without livery and bargain and sale without enrolment do not affect this. The reasoning in those cases is, that the instrument is complete. There is no intrinsic defect to prevent its being read as full evidence of the intention to pass the land, and revoke the devise. It is from something extrinsic and subsequent to the complete manifestation of the intention by the instrument, that the effect it is in its own nature capable of producing is prevented.

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Ground of the cases of feoffment without livery and bargain and sale without enrolment, with respect to revocation of a devise.

In each of the cases in *Roll's* Abridgment (*a*) the party had done all; and the intention failed from a circumstance extrinsic. In one case a complete power of attorney authorizing a person to make livery was executed: but the livery was not made. In the other, a grant of a reversion before devised, the tenant did not attorn. That did not take from the sufficiency of the grant, fully and legally manifesting the intention of the grantor. It is said in *Roll*, (*b*) that if there is devise to one by will in writing, and a subsequent devise to another by parol, the latter though void as a will, is a revocation of the former. That is given as a *dictum* of Lord Chief Justice *Popham*, not as a decision; and cannot be supported; if I am right in these principles. It is said, *Roper* v. *Radcliffe* proves, that a will may be ineffectual to the object in view; and yet shall operate as a revocation. But that does not bear upon the question, whether a will defectively executed and incapable as a will shall be a revocation. There the will was perfect and complete; though the devisee was prevented by personal incapacity from taking. A perfect and complete will, inconsistent with a former, must necessarily be a revocation; though the devisee may never derive any benefit from it. So in *Beard* v. *Beard* the deed poll had no defect in itself; and therefore notwithstanding the personal incapacity to take it revoked the will.

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A perfect and complete will, inconsistent with the former, is a revocation, though the devisee may never derive benefit from it: otherwise if defectively executed, and incapable as a will. (1)

The cases of *Eccleston* v. *Speak*, and *Onions* v. *Tyrer*, prove, that even an express revocation of all former wills, though not wanting in any circumstance for a revocation, shall not operate as such; as it was evident, the only purpose of revocation was to give effect to the new will. It is true, the uses, were nearly the same: but those cases prove, that an express intention declared to revoke, if only subservient to another purpose, for which the instrument is incompetent, shall not revoke. In this case the purpose to revoke is only subservient to another purpose, for which it is incompetent; and therefore it is incapable of effecting a revocation. Besides, in *Onions* v. *Tyrer* Lord *Cowper* says, it would have made no difference in his judgment, if the latter will had been in favour of a different person. His Lordship is speaking of an instrument containing also an express revocation: but in this instance

An express revocation, if only subservient to another purpose, for which it is incompetent, shall not revoke.

(*a*) 1 *Rol. Ab.* 615. (*b*) *Ibid.*

{(1) See *Lawson* v. *Morrison*, 2 Dall. 286.}

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Rule of the civil law: "Tunc prius "testamentum "rumpitur, cum "posterius per- "fectum est."

there is only an implication from the new and ineffectual appointment. I should have no difficulty of * acceding to this doctrine; for the revoking clause is only intended to operate as part of the will; and the rule of the civil law is, "*Tunc prius testamentum rumpitur, cum posterius perfectum est.*" In *Limbery* v. *Mason (a)* that is laid down as the rule of our law: "There is no doubt, but the testator by any writing directly designed for the purpose, and executed as the Statute 29 *Charles* II. directs, or by any cancelling, obliteration, &c. designed merely to disannul the former will, might have revoked it without more: but he designs to do it by a new will; and unless such writing be effectual to operate as a will, it shall not amount to a revocation." *(b)*

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Upon the whole my humble opinion is, that the codicil of 1801 does not revoke the appointment of *Mr. Strangways* to be guardian.

The question then is, whether he is appointed guardian of all the sons, or of those only by the first marriage. From the circumstance of committing the guardianship to the wife and brother, or the survivor, it may be argued, that he could only mean sons of that marriage; as the wife could not by survivorship be guardian of any other sons. I thought that probable at first. But the words are large enough to comprehend all sons born after the will. No restriction is imposed upon the generality of the expression. The inference, though probable, is not necessary; and I am not inclined, any more than my *Lord Chief Justice*, to put a construction upon words requiring none, as having in themselves a plain and distinct meaning, because some other words do not quite so well accord with them as upon the proposed construction. There is no direct repugnance between the different parts of the clause.

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The whole might operate, as the event should turn out: and the guardianship of all the sons would be provided for in the event of either surviving; so that the guardianship could be claimed. If Lady *Ilchester* had survived, she would necessarily have been guardian of all: unless the case of a divorce and children by a second marriage in her life can be supposed; which certainly was not in the testator's contemplation. She having died first, he will be guardian. There is no inconsistency in saying, the guardianship shall extend to all, making it necessary to restrain it; for either could take the guardianship of all at the time either could claim the guardianship. *Mr. Strangways* therefore is the guardian of all the sons.

The Lord CHANCELLOR.—I have only to express my entire concurrence in the judgments, that have been delivered; and I do not think, that I can more correctly express my acknowledgments to *The Master of the Rolls* and *The Lord Chief Justice* than by referring myself to the reasons, that have been so ably stated in those judgments.

(a) *Comyns' Rep.* 451. (b) *Comyns' Rep.* 454.

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The consequence is, this petition must be dismissed. In this case I need not add, that though the effect of the appointment of a guardian is to commit the custody of the guardianship, this Court looks with great anxiety to the execution of the duty belonging to the guardian, and the attention expected to be paid to the reasonable wishes of the natural parent. Though it is not necessary in this instance, upon such a contest it is important to observe, that it can never end happily but by implanting in the hearts of the children filial and dutiful feelings towards the parent; the best and most important duty imposed upon the guardian by the deceased parent.

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Settlement in pursuance of articles, previous to marriage, to convey to the use of the husband for life; remainder to wife for life; remainder upon trust to convey unto and amongst all and every or any of the children in such parts and proportions, &c. as the husband and wife or the survivor should by deed or writing with or without power of revocation, or by will appoint: in default of appointment, to the first and other sons in tail male; remainder, subject to trusts that failed, to the heirs of the husband. A joint appointment by deed, subject to a proviso for revocation and reappointment by the husband and wife and the survivor, well revoked by the wife surviving, and by the same deed a reappointment to the daughter and two sons successively for life, with remainders in tail to the grandchildren, and the ultimate remainder to the daughter in fee, void for the excess beyond the power, viz. the estates to the grandchildren, and the ultimate limitation upon them to the daughter; and the principle of *cy pres* not applicable. All beyond the life estates of the children therefore to go as in default of appointment.

THE bill was filed to obtain specific performance of a contract, entered into by the defendant, to purchase the manor and estates of *Garlands* in the county of *Essex*. The decree directed a reference to the Master, to see, whether the plaintiffs could make a good title. The state of the title was as follows:

By articles of agreement, dated the 16th of *December*, 1730, previous to the marriage of *Jerningham Cheveley* with *Louisa Mary Jamineau*, the said *Jerningham Cheveley* covenanted, that he would within six months after the marriage convey the manor and estates of *Garlands* upon the following trusts: viz. to the use of himself for life, without impeachment of waste; remainder to the use of the said *Louisa Mary* for life; remainder to the use of trustees and their heirs; upon trust to convey and assure all or any part of the said estates unto and amongst all and every or any of the children of *Jerningham Cheveley* on *Louisa Mary Jamineau* to be begotten, in such parts and proportions, and for such estate and estates, and with and under such charges, provisoes, conditions, and limitations, as they or the survivor should from time to time by any deed or deeds, writing or writings, either with or without power of revocation, to *be by him, her, or them, signed and sealed in the presence of three or more credible witnesses, or by his or her last will and testament in writing, testified as aforesaid, limit or appoint; and in default of such appointment it was declared, that the trustees should stand seised to the use of the first and other sons of *Jerningham Cheveley* and *Louisa Mary Jamineau* successively in tail male; with remainder to the use of trustees, upon trusts, which afterwards

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became incapable of taking effect; remainder to the use of the right heirs of *Jerningham Cheveley*.

The marriage took place; and by indentures of lease and release, dated the 20th and 21st of *September*, 1768, reciting the articles, and that there was issue of the marriage then living, two sons, *Jamineau* and *Jerningham Cheveley*, and one daughter, *Jane Cheveley*, all of whom had attained the age of twenty-one. *Jerningham Cheveley*, the elder, in pursuance of the articles, and in consideration of the marriage, &c. conveyed the said estates to the surviving trustee in the articles and his heirs; to hold to the following uses: viz. to the use of *Jerningham Cheveley* the elder, for life, without impeachment of waste; remainder to the use of *Louisa Mary Cheveley* for life; remainder to the use of all and every or any of the children of *Jerningham Cheveley* on *Louisa Mary* begotten or to be begotten, in such parts and proportions, and for such estate and estates, and under such charges, provisoes, conditions, and limitations, as they or the survivor should from time to time by any deed or deeds, writing or writings, either with or without power of revocation, signed and sealed, in the presence of three witnesses, or by will, testified as aforesaid, direct, limit, or appoint; and in default thereof to the use of *Jamineau*
[384] *Cheveley*, the eldest son, and the heirs male of his body; with similar remainders to *Jerningham Cheveley*, the second son, and to the third and other sons; remainder to the use of the right heirs of *Jerningham Cheveley* the elder.

By indentures dated the 22d of *September*, 1768, reciting the articles and settlement, and the intention to make some provision for *Jane Cheveley* and *Jerningham Cheveley*, the younger, *Jerningham Cheveley*, the elder, and *Louisa Mary*, his wife, by virtue of the power in the articles and settlement, did direct, limit, and appoint, unto and to the use of *Jane Cheveley*, her heirs and assigns, the reversion in fee, to take effect in possession after the decease of *Jerningham Cheveley*, the elder, and *Louisa Mary*, his wife, and the survivor, to hold unto and to the use of *Jane Cheveley* and her heirs; upon trust, as soon as conveniently might be, raise 1000*l.* for the benefit of *Jerningham Cheveley*, the younger, also a party to that deed, as therein mentioned; in which deed there was the following proviso, that it should be lawful for *Jerningham Cheveley*, the elder, and *Louisa Mary*, his wife, and the survivor, from time to time or at any time or times, during the lives of them or the survivor, by any deed or instrument in writing with or without power of revocation, sealed and delivered by them or the survivor in the presence of and attested by three or more credible witnesses, subject to the payment of the said 1000*l.* to revoke, alter, and make void, the said limitation and appointment to or in favour of *Jane Cheveley*, her heirs and assigns, and by the same or any other deed or instrument, to be by *Jerningham Cheveley*, the elder, and *Louisa Mary*, or the survivor, sealed, &c. to direct, limit, &c. unto and amongst all and every or any of the children of the

said *Jerningham Cheveley*, on *Louisa Mary*, his wife, begotten in * such parts and proportions, and for such estate and estates, and with and under such charges, provisoes, and limitations over, but such limitations over to be for the benefit of some or one of the said children, as *Jerningham Cheveley* the elder, and *Louisa Mary*, his wife, or the survivor, should from time to time direct, limit, or appoint.

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By indentures, dated the 23d of *September*, 1768, 1000*l.* was raised for *Jerningham Cheveley* the younger, by mortgage for a term of 500 years under the deed of the 22d of *September*, 1768.

Jerningham Cheveley, the elder, died on the 2d of *February*, 1769, without having revoked the appointment; and not having any other children.

Louisa Mary Cheveley by a deed, dated the 29th of *March*, 1773, revoked and annulled the said joint appointment of the 22d of *September*, 1768, except as to the said sum of 1000*l.*; and by virtue of the power in the indenture of the 22d of *September*, 1768, &c. and in execution thereof, did direct, limit and appoint, the remainder or reversion expectant upon her decease in the said estates to the use of the said *Jane Cheveley* and her assigns for life, without impeachment of waste for cutting such timber as would not improve, subject to the payment of the said sum of 1000*l.* and interest, and to the said term of 500 years: provided; that it should be lawful for *Jane Cheveley*, when she should be in the actual possession of the premises for life, by demise, lease or mortgage, to raise any sum not exceeding 1000*l.* payable after her decease to such person and persons, and in such manner and form, as she by deed or will should appoint; and subject to such appointment, if any, from and after the decease of *Jane Cheveley* to the use of *Jamineau Cheveley* for life without impeachment [386] of waste; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to *Jerningham Cheveley* the younger and his first and other sons in the same manner; with remainders to the daughters of the two *Mr. Cheveleys*, and to the sons of *Jane Cheveley*; remainder to the use of *Jane Cheveley*, her heirs and assigns.

In 1776 *Louisa Mary Cheveley* died; leaving her three children surviving.

Jane Cheveley having by her will, dated the 4th of *May*, 1790, devised the estates to the plaintiffs in trust to sell, died without issue. *Jamineau Cheveley* was the surviving son and heir at law of *Jerningham Cheveley*, the elder; and he survived *Jane Cheveley*, his sister; and died without issue. *Jerningham Cheveley* the younger was long since dead; leaving issue three daughters, defendants; who were heirs at law to *Jamineau Cheveley*.

The bill also prayed; that, if the Court shall be of opinion, there is any estate in such of the defendants as claim under the will of *Jamineau Cheveley*, they may be declared trustees; and may join in the conveyance.

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The Master by his report stated his opinion, that the joint appointment to *Jane Cheveley* under the deed, dated the 22d of *September*, 1768, was good; and that the appointment by the deed, dated the 29th of *March*, 1773, was wholly void, though made, so far as respects the children of the marriage, in pursuance of the power of revocation and reappointment reserved by the deed of the 22d *September*, 1768; because it was not intended by the articles, that a joint appointment should be defeated by any but a joint revocation: but if the [387] said power of revocation and reappointment was well reserved by the deed of the 22d of *September*, 1768, and well executed by the deed of the 29th of *March*, 1773, yet *Louisa Mary Cheveley* executed it in such a manner as never to displace in equity the fee simple vested in *Jane Cheveley* by the first appointment: or, if she did devest that interest by such deed of revocation, she revested it in *Jane* by the reappointment contained in the same deed; and therefore he was of opinion, that *Jane Cheveley* was seised in law or equity of the fee simple of the estate in question at the time of making her will; and consequently, that a good title may be made.

Exceptions were taken to the report by the purchaser; on the ground, that the deed of 1773 was a complete revocation of that of the 22d of *September*, 1768; and therefore the fee simple limited by the latter to *Jane Cheveley* was wholly displaced; and the reappointment to her of the reversion in fee expectant upon the determination of the particular estates limited to persons, not objects of the power, by the deed of 1773 was void; and such fee never did revest in her.

Mr. Richards, and Mr. Horne, for the Plaintiffs, and Mr. Trower for Defendants in the same interest.—The question is, whether the plaintiffs can make a good equitable title: whether the defendants claiming under *Jamineau Cheveley* are trustees for the plaintiffs. If there is a doubt upon the title, the Court will not compel a purchaser to take it. (a) But all the parties are brought before the Court who can make a good title. Though in strictness a limitation to grandchildren is not a [388] good execution of such a power as this, (a) yet the Court will mould it so as to answer the general intent; according to *Pitt* v. *Jackson*, (b) *Griffith* v. *Harrison*, (c) and other cases. Though these are cases of wills, upon the execution of articles the Court takes the same course; and controls the legal effect; particularly in the case of articles made before marriage; availing itself of the distinction between trusts executed and executory; which prevailed in *Honor* v. *Honor*, (d) *Trevor* v. *Trevor*, (e) and several other cases: (f) the trusts not being finally settled by the instrument; but some future act remaining to be done, or conveyance to be executed. *Mrs.*

(a) *Cooper* v. *Denne, ante*, vol. i. 565. 4 *Bro. C. C.* 80. *Roake* v. *Kidd, ante*, vol. v. 647.

(a) p. 388. *Bristow* v. *Warde, ante*, vol. ii. 336. *Smith* v. *Lord Camelford, ante*, vol. ii. 698. *Crompe* v. *Barrow, ante*, vol. iv. 681, and the references.

(b) 2 *Bro. C. C.* 51. (c) 3 *Bro. C. C.* 410. (d) 1 *P. Will.* 123.

(e) 1 *Eq. Ca. Ab.* 387. (f) *Fearne's* Con. Rem. 123, &c. Ed. 4.

Cheveley by the appointment in 1773 meant to give estates warranted by the articles; and the Court will lay hold of any thing to support that manifest intention. Her intention was to provide for the issue; which she could not do by making them purchasers. Her general intent therefore must be taken to be to keep the estate in her family by giving her sons estates tail; which would descend to their issue. The Court seeing the substantial object will overlook the form; and execute the general intention. Upon the argument of this case at law, (g) Lord *Kenyon* supported his opinion in *Pitt* v. *Jackson*. If a Court of Law will mould legal limitations in a will to answer the intent, much more will a Court of Equity mould the equitable interests.

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The Counsel for the Defendants was stopped by the Court.

The Lord CHANCELLOR.—If you cannot find a case that has adopted the doctrine of *Cy pres* upon such a head as this, I will not introduce it in this instance. I do not see how to get at it either upon principle or authority. Suppose, instead of articles, an actual conveyance, reciting the marriage; that *Jerningham Cheveley* was to take a considerable personal estate; and he had thereby conveyed to the use of himself for life, without impeachment of waste; with remainder to his wife for life; remainder to trustees and their heirs, for a legal estate, but upon trust to convey according to these limitations: this settlement would be a contract, under which all the issue would be purchasers of the estates thereby limited; and under which the husband and wife would be purchasers of the powers given to them; and the issue would be purchasers of the estates after to be limited by a due execution of the power. But they must be limited by a due execution of the power, in order to raise them; for there is no equity whatsoever between one purchaser under the deed, and another, to raise any question, whether a different effect shall be given to the instrument, called an execution of the power; as is done in the cases, that have been alluded to. [389]

If it stood thus in 1773, the date of the execution of the power, the elder *Mr. Cheveley* would have had a vested estate tail; and his brother would have had an estate tail; and they would have a right both in Law and Equity to the enjoyment, unless their sister could produce some instrument, placing her prior to them in the order of limitation. *Mrs. Cheveley* executes her power by a deed, professing an intention to execute it according to the real meaning of the articles; revoking the appointment before made, with intent, I agree, to execute the power according to the real meaning of the articles. This [390]
case does not come near *Pitt* v. *Jackson* and the other cases upon wills: first, as they are cases upon wills, not deeds; to which this doctrine has not been applied: secondly, those cases have at least gone, as Lord *Kenyon* observes, (a) to the

(g) 1 *East.* 442, *ante*, vol. ii. 442. (a) 1 *East.* 451.

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utmost verge of the law; and I shall find it very difficult to alter an opinion I have taken up, that it is not proper to go one step further; for in those cases, in order to serve the general intent and the particular intent, they destroy both. But it is not necessary to go further into them; for in those cases the Court have said, this is the legal effect of the language. There is no possibility of saying that here; nor could it be argued consistently with the real intention of the author of the deed; for I must suppose her conusant of the estate her sons had under the articles, and would have had under the settlement, if executed. Then she must contemplate them as having already estates tail; and that the reversion in fee was to be disposed of. Can it be said, her intention by this deed, with these limitations, was to throw in *Jane's* estate before her brothers, and to give them just what they had before: and that after the execution of that deed they were to have just what they had before, only in a different series of limitation?

The rule, that a limitation to the heirs of the body in articles shall be carried into execution by a strict settlement, does not prevail, where the concurrence of both parents would be necessary to bar the intail.

The cases as to articles do not apply. In those cases the Court says, such words in articles shall be taken to denote such an intent; and the conveyance shall be according to the intent so manifested. In *Highway* v. *Banner* (b) the concurrence of both parents being necessary for barring the intail, a different construction was given to the words "heirs of the "body," from that adopted in the other cases. But the question here is, not how to construe articles, so as to protect the issue *against the parent; but whether, where it is agreed on all hands, that there is no doubt as to the meaning, as between persons all alike purchasers, there is an equity for one to have the estate against the others, merely, because the parent exceeded the power given by the articles. Those cases do not apply; and there is no one authority, that upon the mere ground of the intention of the person executing, you take away for the benefit of one child that estate, which for default of a due execution of the power was vested in the other child. The sons did not execute the deed with their mother. It is therefore her act alone; and there is nothing to bind them.

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Bill dismissed.

(b) 1 *Bro. C. C.* 584.

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NANNOCK *v.* HORTON.

July 20th.

Investment of stock directed in trust to pay the dividends to the testator' son for life; and after his death to transfer part of the capital according to his appointment; an interest for life only, with a power.

Power of appointment not executed by a will having no reference to the power or the subject of it; and the Court will not inquire into the circumstances of the property.

Under a residuary bequest to the legatees in proportion to their legacies, all legatees, pecuniary and specific, even of rings, &c. not expressly or by implication excluded, were held entitled: so annuitants, if they had not been excluded upon the construction of the whole will.

THOMAS NORMAN, by his will, dated the 17th of *February*, 1792, gave to several persons each a mourning ring, of the value of two guineas. He gave several pecuniary legacies, as to some with a limitation over in case of the death of the legatee under the age of twenty-one. He also gave some Annuities for the lives of the several annuitants. He gave to the five children of *Elizabeth Norman* 50*l.* each, to be paid at their respective ages of twenty-one; with survivorship, in case of the death of any under that age, equally. He gave 2000*l.* 3 per cent. Consolidated Bank Annuities to his executors; which he directed *should be invested one month after his decease; in trust to pay the interest from time to time to *Frances Jackson*, for the maintenance and bringing up of her two children *Thomas Charles Jackson* and *Frances Jackson*, who were also legatees of 200*l.* each, payable at twenty-one, with survivorship, until they shall respectively have attained their ages of twenty-one years; and in case of her death the said interest was to be paid to her husband *Charles Jackson*, to be by him applied for the benefit of his said two children; and when the said two children should have respectively attained twenty-one, in trust to transfer a moiety of the principal stock unto each of such children upon their attainment of their said ages respectively; and in case either of such children should die before, then he gave the whole principal stock and all benefit thereof unto the survivor of them absolutely. To the said *Frances Jackson*, the wife of *Charles Jackson*, for her sole use and benefit for life he bequeathed the interest and dividends of 1000*l.* 3 per cent. Consolidated Bank Annuities; and directed, that his executors should invest the said sum of 1000*l.*; and should stand possessed thereof in trust to pay the interest to her for life, free from the contracts of her husband, for her separate use; and after her decease he gave the said principal sum unto her said two children equally; and in case of the death of either of them before that time he gave the share of him or her so dying to the survivor absolutely. He directed, that the said legacies and annuities thereinbefore given should vest immediately after his decease in all such of the several legatees and annuitants, who should survive him. The testator then gave to his son *Robert Norman* 4000*l.* He likewise gave to him during his natural life the interest and dividends of 8000*l.* 3 per cent. Consolidated Bank Annuities; which he ordered that his executors should purchase and transfer in their names; and should stand possessed thereof, in trust to pay such dividends, [393] as the same should become payable, unto his said son during his life; and from and immediately after his death in trust that his executors should pay, apply, and transfer 6000*l.* part of such capital stock, unto such person or persons, at such time, manner, and form, as his said son by any deed or writing, executed in the presence of two witnesses, or by his last will and testament

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executed by the like number of witnesses, should in that behalf order, give, direct and appoint; and, as to the remainder of such capital sum or stock, from and immediately after his said son's death in trust to pay and apply the same to and amongst the several persons, therein before mentioned, to whom he had given legacies, rateably and in proportion to their said legacies. He also gave his said son a leasehold house.

The testator also ordered his executors to purchase or transfer into their names 14,000*l.* 3 per cent. Consolidated Bank Annuities; and that they should stand possessed thereof in trust to apply the whole or such part of the interest as should be necessary for the maintenance of the two natural children of his late son *John Norman*, until they should respectively attain twenty-one; and when they should have attained that age respectively, in trust to transfer such capital stock as follows: *viz.* 9000*l.* part thereof, to *John Henry Norman*, one of the said children, and 5000*l.* to *Ann Norman*, the other; and he directed his executors to see to the bringing them up until the age of twenty-one; and, if any overplus at that time, to be divided between them in proportion to their shares: but in case the said two children should die before their attainment of such age, then he gave and bequeathed the capital of the 14,000*l.* unto and amongst the several persons thereinbefore named, to whom he had given legacies, to be divided amongst them in proportion to their several legacies therein-
[394] before given to them respectively (his son *Robert Norman* excepted;) and in like manner as to the shares of such capital stock of either of them dying before the attaining of such age, except as aforesaid.

He then gave a freehold house to his executors; upon trust to convey to the said *John Henry Norman*, his heirs, &c. when he should attain twenty-one; and in the meantime to receive the rents and profits, and improve the same for his benefit: but in case of his death before that age to be sold, and the money to be divided amongst the said legatees in proportion to their several legacies by him thereinbefore given, except as aforesaid, and the natural daughter of the said *Ann Pratt*.

The testator then gave three more legacies of 50*l.* 10*l.* and 10*l.*: and bequeathed to different persons different suits of clothes and a bed and furniture, and bed linen. All the rest and residue of his estate and effects whatsoever and wheresoever and of what nature or kind soever he gave and bequeathed the same unto and amongst the several legatees thereinbefore named, to be divided amongst them in proportion to the several legacies by him thereinbefore given to them respectively, except, as aforesaid, and the said natural son of his late son *John Norman* deceased; and he directed, that if his estate should fall short in payment in full of the said legacies and annuities, the same should be made good by and out of the said 14,000*l.* 3 per cent. Consolidated Bank Annuities so as aforesaid given to the son and daughter of his late son *John Norman*.

By a codicil of the same date the testator directed, that his said son *Robert Norman* should receive the interest and dividends of

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6000*l.* 3 per cent. Consolidated Bank Annuities during his life only, instead of the * interest and dividends of 8000*l.* like annuities given him by the said will; and that he should at his death have liberty to dispose of 4000*l.* part of the said 6000*l.* Bank Annuities, only; and the testator thereby confirmed his said will in all other respects. [* 395]

Robert Norman, the testator's son, by his will, dated the 8th of *November*, 1793, executed in the presence of two witnesses, and signed by them, gave and bequeathed to *Elizabeth Laws*, his friend and companion, the sum of 2000*l.* 3 per cent. Consolidated Bank Stock: to his wife *Alice Norman* 1000*l.*; and he gave to five other persons legacies of 500*l.* each; not disposing of the residue, nor appointing executors.

The bill was filed by some of the legatees of *Thomas Norman;* and the necessary accounts and inquiries were directed. The cause coming on for farther directions, it appeared by the Master's Report, that, exclusive of the interest that *Robert Norman* had in the 4000*l.* stock under the will of his father, his whole personal estate was not equal to the legacies given by his will. That fund of 4000*l.* was claimed by the widow of *Robert Norman;* who had taken out administration to him.

The questions were, First, whether under the will and codicil *Robert Norman* took the absolute interest in the 4000*l.* stock, or an interest for life only with a power of appointment: and if the latter, whether his will could be considered an execution of the power: Secondly, whether the personal representative of *Robert Norman* in respect of his pecuniary legacy of 4000*l.* was entitled to a share of the 2000*l.* stock, the surplus beyond the stock, which was the subject of the first question: Thirdly, whether the annuitants, and the specific legatees of rings, &c. were entitled to share in the residue with the pecuniary legatees.

The Solicitor-General, Mr. Lloyd, and Mr. Stanley, for the Plaintiffs. Upon the first question, as to the interest of *Robert Norman* in the 3 per cent. Consolidated Bank Annuities, he took only the interest for life, with a power of appointment; according to the distinction taken in *Liefe* v. *Saltingstone;* (*a*) followed by *Maskelyne* v. *Maskelyne*, (*b*) *Elton* v. *Sheppard*, (*c*) and *Fisher* v. *The Bank of England:* (*d*) determined expressly upon that distinction. Some intention then to execute this power must be shown: *Andrews* v. *Emmot.* (*e*) In *Hales* v. *Margerum* (*f*) it was held the absolute property of the testatrix, independent of any power; and qualified merely with reference to her situation as a married woman. In that case Lord *Alvanley* expressly says, no inquiry can be made into the property. This sum of 4000*l.* stock must therefore fall into the residue. [396]

As to the persons, who are to take the residue, the legatees of

(*a*) 1 *Mod.* 189. *Carter*, 232. 2 *Lev.* 104. *Tomlinson* v. *Dighton*, 1 *P. Will.* 149.
(*b*) *Amb.* 750. (*c*) 1 *Bro. C. C.* 532.
(*d*) At the Rolls, 3d *July*, 1795. (*e*) 2 *Bro. C. C.* 297.
(*f*) *Ante*, vol. iii. 299. See also *Langham* v. *Nenny*, *ante*, vol. iii. 467. *Croft* v. *Slee*, *ante*, vol. iv. 60.

1802. NANNOCK v. HORTON.

stock are entitled to share with the pecuniary legatees in proportion to their legacies; but how can the legatees of rings or clothes be entitled to share? They could not be intended.

Mr. Richards, and Mr. Trower, for the Defendant, the Administratrix of Robert Norman.—If it appears, the party intended to act upon this property, that is sufficient to enable him to dispose of it, pursuant to his power. Lord *Kenyon*, in *Andrews* v. *Emmot*, cites those cases with approbation. In this instance, as in that, the personal estate, exclusive of the subject of the power, [397] is not nearly sufficient for the legacies. By the codicil no form of disposition is prescribed: a complete and absolute power of disposition is given to him. Suppose a devise of an estate in *Middlesex:* the devisor not having any estate in *Middlesex;* but having a power to dispose of an estate in that county: your Lordship would admit evidence. This testator had not 2000*l.* 3 per cents. and must therefore have intended disposing of that sum to exercise his power over the 4000*l.* stock; though not particularly disposing of the whole of it. A reference to the subject of the power is sufficient within all the authorities.

But there is a great deal in the other point; that this is an absolute gift to *Robert Norman* in all events. A gift to a person, to be at his disposal, is an absolute gift. The variation between the will and codicil, both executed in the same day, is important. Though the codicil expresses the gift to be for life, he has also an absolute power of disposition; and might have done any thing with it.

With respect to the 2000*l.* stock, beyond the subject of his power, *Robert Norman* was entitled to share with the other legatees. He is expressly excluded, wherever intended to be excluded; and there is nothing absurd or uncommon in the circumstance, that the benefit does not arise till after his death.

The Solicitor-General, in Reply, observed, that the principle was clearly settled in *Andrews* v. *Emmot*, *Standen* v. *Standen*, (a) and *Hales* v. *Margerum;* and, that the insufficiency of the estate to answer the legacies was never considered a sufficient ground for holding the will an execution of the power.

[398] *The Lord* CHANCELLOR. The first consideration is, what interest *Robert Norman* had in the 4000*l.* stock. If he was absolutely entitled to it, there can be no question, that it will pass under his will. The express subject of the bequest in the will of the father is the interest and dividends; and the stock itself, as far as the legal disposition of the capital, is to be vested in the names of trustees, and to remain in their names at least during his son's life. By the will the power of the son is to be executed by a certain form; and he could give no interest by a will in any other form. In the gift of the remainder of the stock to the legatees, it is true, the words would vest transmissible interests, if they should die before his son: but in considering what he meant as to his son it is fit to attend to the very words. In the codicil,

(a) *Ante*, vol. ii. 589.

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of the same date as the will, there is a phrase, which coupled with the will, satisfies me, he meant, the stock should remain in the trustees during the whole of his son's life; "that he should at "his death have liberty to dispose of 4000*l*." &c. The meaning of both instruments, taken together, is, that the executors should purchase or transfer to their names 6000*l*. stock: the son to have the interest and dividends for his life; and of the capital, which during his life was to remain in the names of the trustees, he was to have liberty to dispose of 4000*l*. at his death. But the codicil was not by any means intended to enlarge the interest he had in it under the will. On the contrary, the primary intention of the codicil was to reduce his power as to the quantum, over which the testator had given him an authority; and this is within the principle of the cases, that, where there is a particular, limited, interest, and this sort of power, liberty, or authority, though the latter without a particular, partial, limited, interest pointed out might have amounted to an absolute gift, yet, where both occur, the gift is held to be of the limited interest; and the other to be but a power, and * not an interest. *Robert Norman* therefore had not that interest, which, if he meant to give by his will what he was interested in, would pass by his will: but it was necessary, in order to pass it, that he should execute it as a power.

Where a particular, limited, interest and a power concur, though the latter alone might amount to an absolute gift, they are distinct.

[* 399]

The next question is, has he executed it as a power? I am not sure, the rule does not oblige the Court to act against what probably might have been the intention nine times in ten. There is not in this will any reference whatsoever to the power; nothing having a necessary reference to it; or, that can be stated as having any reference; except the words "3 per cent. Consolidated "Bank Stock." That sum is so given, that it cannot be disputed, that, if, when he died, he had not had any stock, but had other personal estate, that stock must have been purchased for the legatees. It is not specific. It would operate only as a direction to purchase stock, if he died without any stock; and it is very difficult to say, that what would amount to that direction in a will, is to be construed into a gift of that, which was not his to give, but over which he had a power. With respect to the case put in the argument, of *Black-acre* in *Middlesex*, there is great difference between real and personal estate. Every gift of land, even a general residuary devise, is specific. Only that, to which the party is entitled at the time, can pass. (1) But, as to personal estate, he may give that, which he has not, and never may have; and at all events whatever he may happen to have at his death will pass. He might have had stock, before he died; though he might have had none at the date of the codicil. But, if he never had any, yet the terms of this bequest would be satisfied; calling for this construction; that the executors must buy it after his decease.

Distinction as to real and personal estate. Every gift of land, even a general residuary devise, is specific; and that only, to which the party is entitled at the time, can pass: in the case of personal property what he has at his death will pass; and if the description is specific, it may operate as a direction to purchase.

{(1) 3 Johns. Cha. Rep. 310.}

1802. The case of *Andrews* v. *Emmot* and the others of that class are clear, and distinct, and positive, and express, * to the point,
NANMOCK that you are not to inquire into the circumstances of the testator's
v. property at the date of the will, to determine, whether he was executing the power or not.
HORTON. It may be difficult to reconcile the ap-
[*400] plication of that rule with a construction that may be put upon the passage cited (*a*) from *Modern*. (*b*) But that may amount only to this; that, where it is sufficiently described, the gift shall hold as an interest or as a power. But the subject must be described in apt terms. The difficulty I had as to *Andrews* v. *Emmot* was, how the Court could by any evidence, that could be stated by the Report, have brought under the words "my personal estate," that property, which was in no sense his. *Hales* v. *Margerum* is very different. The true point of Lord *Alvanley's* decision turns upon this; that the testatrix had by the effect of the other will such an interest in that stock, as entitled her with great propriety to say, that was her stock; and his Lordship was of opinion, the other will, placing the stock in trustees, and giving her the receipt of the profits for her separate use and the power of disposition at her death, amounted to evidence upon the face of the will sufficient to satisfy the Court, that the testator meant, that stock should be her's; and he would not infer against that any thing from the circumstances and the trusts created in the will; which he thought were inserted only to make the stock more effectually her's than it would have been without those trusts and circumstances; considering, that she was a married woman. But his Lordship most distinctly states, that he decided that case consistently with all the other cases. In this will there is nothing, that refers to the power; nothing necessarily descriptive of the property, over which it existed; and therefore, whatever might have been the intention, I am bound by the authori-
[401] ties to say, this testator did not mean to affect any property but what was his own.

The next question is as to the 2000*l*. stock; whether *Robert Norman* is entitled to any interest in it. That depends upon the will, the codicil, and the general scheme of the whole, taken together. I am strongly of opinion, it was not the intention of the testator to consider this son as, in the sense, in which the words are used, one of the persons "thereinbefore mentioned," to take a share of that fund of 2000*l*. stock. The son would be dead, and could not be existing as a person, to whom it could be paid or transferred; and though, I agree, as to the others it would be transmissible in case of their deaths, yet that is more the effect of the law than of the testator's intention; and I am confirmed in that by this; that, when he disposes of the contingent interest in the 14,000*l*. stock and of the residue, excepting those he means to except, he names them; and, excluding *Robert Norman* in both instances, the general intention appears, making this provision for him, not to include him after his decease as one of the persons to take a share in the capital. As to the 14,000*l*. stock he

(*a*) 2 *Bro. C. C.* 300. (*b*) 12 *Mod.* 469.

thought it necessary to exclude *Robert Norman* by name; satisfied, that in the former instance he was excluded, though not expressly, by the manner, in which the gift was made: but in the disposition of other property by a subsequent part of his will, not thinking he had excluded him in the manner of giving that. In the contingent disposition of the produce of the house, directed to be sold, he makes a similar exclusion; with the addition of the natural daughter of *Ann Pratt;* not excluding her brother; upon whose death the gift depended. It is not a circumstance of great weight, but not altogether unworthy attention, that it is not very probable, the testator should exclude *Robert* from a share of the other funds, meaning, that he should take a share of the 2000*l.* [402] He is therefore excluded as to the 2000*l.*; and the 4000*l.* falls into the residue; from which he is expressly excluded.

The question then is, who are the legatees to take these different funds. The word "legacies" would take in all sorts of legacies. Annuity is in a sense legacy; and annuitants legatees. There is a good deal of difficulty as to the arrangement in supposing specific legatees meant here. But all conjecture upon that is shut out; for that part of the will excluding the natural children of *Ann Pratt* shows they would take under the description of legatees, unless expressly excluded. In the case upon the Duke of *Bolton's* will a charge of legacies was held a charge of annuities. But then the question always is upon the whole context of the will taken together; and I rather think this testator did not mean annuitants, upon the clause, in which speaking of annuities he contradistinguishes them from legacies, using the words "legacies and annuities." The same reasoning, therefore, that proves specific legatees are intended, authorizes the Court to say, annuitants are not intended there. They are also probably not intended; as it is much more easy to collect the share upon the pecuniary legacy than the share of an annuitant; valuing his annuity. But there also the difficulty occurs as to the specific legacies. The annuity is not transmissible; but ceases with the annuitant; and it is much more difficult to suppose they are meant to take than pecuniary legatees: the legacy being part of the property of the legatee. This is only my conjecture upon this; and if I had found the other construction declared, I should not feel strong enough to disturb it. But my opinion is, that the distribution is to be among all the legatees, thus considered, whose names occur prior to the distribution, except those expressly or by implication excluded.

A charge of legacies held a charge of annuities.

As to the legatees of rings, I do not believe he meant them to [403] take any share: but still they are legatees; and there is no phrase to characterize them, upon which I can conjecture, as I can upon the word "annuities." The best construction is to give the word all the operation it will have, unless there is something else in the will to confine it.

1802.

July 21st.

Ex parte LORD PETRE. (1)

A large allowance for maintenance and education ordered under circumstances; but with reluctance.

THIS Petition, presented by *Edward Robert Petre*, an infant, and his two infant sisters, prayed, that the Master's Report may be confirmed.

The Report stated, that the real estate, of which the petitioner *Edward Robert Petre* is tenant in tail, is of the annual value of 7250*l.*; subject to a jointure to Lady *Petre* of 1500*l.* a-year, and to portions of 10,000*l.* for the two younger children, and maintenance, not exceeding 400*l.* a-year. The late Lord *Petre*, by his will, gave Lady *Petre* the sum of 2000*l.* the use of a house rent-free, an additional annuity of 500*l.* and a legacy of 10,000*l.* to be void if that additional annuity should be settled upon her by his son. *Edward Robert Petre* was born in 1794; the daughters in 1795 and 1798. They had no fortune, except what they were entitled to under the settlement.

The Report farther stated, that Lady *Petre* had taken a country-house and some land; and that the petitioners were educated at home. A private tutor was engaged at 100*l.* a-year; and it was proposed, that a governess and proper masters should be employed: a man servant for *Edward Robert Petre;* a coachman; one household servant at the country-house; a gardener, and two [404] maids for the daughters. The Master found, that the probable annual expense of the maintenance and education of *Edward Robert Petre* is 1550*l.* and of the daughters 500*l.*; and stated, that 1600*l.* a-year is proper to be allowed to Lady *Petre* for the maintenance and education of *Edward Robert Petre* for the time past since the death of his father, (2) and the time to come; and 400*l.* a-year for the daughters.

When this Petition first came on, the *Lord Chancellor* directed a reference to the Master to review his Report; regard being had to the circumstances of the daughters and of their mother.

The Master by his further Report repeated his former opinion; observing, that Lady *Petre's* annual income does not exceed 2000*l.* a-year; and that considering the rank and tender years of the petitioners, and their religion, (*a*) it is most advantageous that they should be brought up together, and educated under their mother.

The Lord CHANCELLOR stopped *Mr. Romilly* in support of the Petition, saying, he should confirm the Report; though not very willingly; and would not lend a willing ear to any application to increase this allowance.

(*a*) The Roman Catholic religion.

{(1) Cited, and remarked upon, 6 Johns. Rep. 576.}

{(2) See *Wilkes et al.* v. *Rogers et al.* 6 Johns Rep. 566; and *The Matter of Bostwick*, 4 Johns. Cha. Rep. 100.}

1802.

RIDGEWAY v. DARWIN. *July* 21st.

Executor, charged by his answer, not permitted to discharge himself by his affidavit of payments to the testator in his life. (1)

THE Defendant, an executor, being charged by his answer with the receipt of money, attempted to discharge himself by his affidavit of different sums, amounting in the whole to 150*l.*; as paid by him to the testator in his life; and the Master not having allowed that discharge, he excepted to the Report.

* *Mr. Richards, and Mr. Hart, in support of the Exception. The Attorney-General, Mr. Romilly, and Mr. Johnson, for the Plaintiff.*

Admission of the receipt of sums, which sums he had paid, &c. a good discharge.

The Lord CHANCELLOR said, that if a man admitted he had received certain sums, which sums he had paid, &c. the discharge following immediately, in the same sentence, that would do; but he never knew an instance, where a man was allowed to discharge himself in this way by affidavit; observing, that he swore safely to payments to a dead man.

[* 405]

Mr. Hollist (Amicus Curiæ) said, Lord *Hardwicke* determined against such a discharge; as appeared by a case in the Register's Book.

Exception overruled.

Ex parte STOKES. *July* 23*d*.

Petition to supersede a Commission of Bankrupt, before any meeting, upon affidavits of the solvency of the bankrupt, that he never committed an act of bankruptcy, and did not owe the petitioning creditor 100*l.* refused: nor would the *Lord Chancellor* direct an issue.

THE prayer of this Petition was, that the Commission of Bankrupt issued against the petitioner, an attorney, may be superseded. No meeting had taken place under the Commission. The affidavit of the petitioner stated, that he had never committed an act of bankruptcy; that he is solvent; and does not owe the petitioning creditor 100*l.*; and the petitioning creditor had brought an action against him in the last Term for 80*l.* only; that he desired the particulars to be sent to him; which had not been done. The agent of the petitioner swore, that he is worth 3000*l.* after all his debts paid.

In opposition to this the affidavit of the petitioning creditor stated positively, that 178*l.* is due to him from *Stokes;* that the deponent brought an action against him for that sum, which he found he could not recover; and * many other creditors are in the same situation; that, after the Commission issued, *Stokes* offered to pay the deponent; and that he shall be able to prove *Stokes* a bankrupt.

[* 406]

Mr. Richards, Mr. Romilly, and Mr. Cooke, in support of the Petition, cited *Ex parte Parsons. (a)*

The Solicitor-General, and Mr. Hall, for the Assignees. This

(a) 1 *Atk.* 72.

{(1) *Hart* v. *Ten Eyck*, 2 Johns. Cha. Rep. 89. *Beckwith* v. *Butler*, 1 Wash. Rep. 224. *Paynes* v. *Coles*, 1 Munf. 373. pl. 2. *Green* v. *Hart*, 1 Johns. Rep. 589. See also 2 Johns. Cha. Rep. 91, *note*. *Ballinger* v. *Worley*, 1 Bibb's Rep. 195.}

1802.

Ex parte STOKES.

application is perfectly new. If it can be supported, it is at least necessary, to induce your Lordship to interfere, that it should be quite clear that there is no debt upon which a Commission can be taken out, and no act of bankruptcy. The creditors cannot be prevented from taking this course, if they please. In *Ex parte Parsons* the question was only as to the trading; which any man is competent to speak to: but whether there was an act of bankruptcy, or not, is matter of law as well as of fact.

The Lord CHANCELLOR. This is one of the most important applications that ever was made in bankruptcy. Suppose the petitioner should turn out to be perfectly solvent; yet if a debt of 100*l.* is sworn to, and he is a trader, and has committed an act of bankruptcy, a Commission may be taken out; and those facts being well established, the creditor has a right to do so. If this is the effect of the Statutes, the *Chancellor* has nothing to do with the consequences. Whether the law has sufficiently protected the party against the consequences is a consideration for the legislature. If the creditor, who, before the Commission issues, must swear to the effect of all this, an act of bankruptcy, a debt above
[407] 100*l.* and that the party is a trader, takes a false oath, he is responsible to the law of the country. It does not rest there. The petitioning creditor's bond to the *Chancellor*, to prove the party a bankrupt, is not a considerable additional security; being in so small a sum: but where ruin ensues from a Commission maliciously taken out, there is no limitation to the damages a jury may give. Nor does it rest there; for, though it would be an improper length for me to inquire into all the particulars, I do not think it unfit to ask the Solicitor the general question, whether he was instructed, that there was an act of bankruptcy. He will become deeply responsible for the propriety of his proceedings as the Solicitor under the Commission; and, if he has been the instrument of malice without any ground for sustaining the Commission, he will be in a situation of great peril. It is too true in my experience, that any thing may be sworn in bankruptcy: but I trust, the day will come, when the disgraceful transactions we have witnessed (*a*) will be checked by the exemplary punishment that awaits such audacity.

Such being the safeguards interposed, what is the danger of encouraging applications of this nature in this stage of the business? The Bankrupt Law originally looked to bankrupts as criminals; which at this time of day is considered a very harsh application of the term. If in this stage, previous to the discussion before the Commissioners as to the act of bankruptcy, &c. I should interpose; requiring them to swear, not generally, but explicitly, stating all the particulars as to the debt, the act of bankruptcy, &c.; and bringing into affidavits the names of those who are to prove what may be necessary to sustain the Commission, the business in bankruptcy would be swelled to an immea-
[408] surable size by attempts to prevent Commissions: the real object

(*a*) See *ante*, vol. vi. 1.

being to circumvent or abstract the witnesses; who would fully support the Commission. The effect of the acknowledged danger of such a proceeding is, that, though many attempts have been made to set aside Commissions upon these grounds, no one recollects such an application as this.

1802.

Ex parte STOKES.

With respect to the ground, that the bankrupt does not owe the petitioning creditor 100*l.* and the manner in which that is made out, it is enough to say, that, however the inquiry may turn out hereafter, he swears in the most positive terms to the debt. The circumstance of the action, demanding only 80*l.* may be explained. A bill was taken up; and if that was subsequent to the action, it only comes to this; that the creditor did not choose to proceed in that action; but having a further demand, takes this remedy; which he has a right to take, and which I cannot control. If the bankrupt swears himself solvent, after the Commission issued, that will not authorize me to supersede it; for, while the other creditors are unsatisfied, I cannot permit the petitioning creditor to receive his debt; and the Commission being an execution for all creditors, I could only relieve the bankrupt upon proving that he is solvent, by paying all his creditors. The bankrupt swears positively that he never committed an act of bankruptcy; and does not owe the petitioning creditor 100*l.*: but there is no instance upon that ground of preventing its going before the Commissioners. If this was a Commission against the most respectable banker in *London*, with debts thus sworn to, I should have no right to interfere in this stage. I have no authority without a case infinitely more clear, and upon mere suspicion, to say, the creditor shall not prove before the Commissioners, according to law, what he has sworn to the usual extent before me.

Commission of Bankrupt an execution for all creditors. The petitioning creditor therefore cannot receive his debt, and the Commission be superseded, while the others are unsatisfied.

The petitioner then proposed an issue. [409]

The Lord CHANCELLOR. I shall not direct an issue: nor can I go the length of ordering any proceeding under the Commission to be stayed. As this Court is always open, you may present a petition immediately, if dissatisfied with the adjudication of the Commissioners.

NEWMAN *v.* HODGSON.

July 24th.

A MOTION was made, that the sum of 38*l.* might be paid upon a provincial probate only, in the Diocese of *York;* upon the ground, that the sum was so small, and the authority of former orders. (*a*)

Prerogative probate not dispensed with on account of the smallness of the sum.

Mr. Mansfield (*Amicus Curiæ*) said, the sum, for which such an order might be had, was limited to 40*l.* in Lord *Thurlow's*

(*a*) See *Challnor* v. *Marhall*, *ante*, vol. vi. 118.

1802.

NEWMAN v. HODGSON.

time: but he put a stop to it; and a great deal of money had been since lost; where the sums could not bear the expense of a prerogative administration.

The Lord CHANCELLOR refused to make the order; intimating, that a bill ought to be brought into Parliament for these cases: but an order against law could not be made.

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[410]

July 24*th*.

OLDHAM *v.* OLDHAM.

Writ of *Ne exeat Regno* for arrears of alimony and costs.

Affidavit for a writ of *Ne exeat Regno* must state an intention to go abroad: that the defendant will hide himself is not sufficient. It must be positive, that he is going abroad, or to some declaration, that he is, by himself, not a third person. (1)

MR. WETHERELL moved for a writ of *Ne exeat Regno*, on behalf of a married woman against her husband.

Upon the affidavits it appeared, that the plaintiff had instituted a suit in the *Spiritual Court* against the defendant for restitution of conjugal rights; and had obtained a decree for alimony, with costs. The alimony was payable quarterly; and 5*l.* arrears was due; and for costs 81*l.* 14*s*. The affidavit did not state any intention of going abroad; but merely, that a third person communicated to the plaintiff's proctor, that the defendant would not perform the sentence; and would hide himself, where the plaintiff could never find him.

The Lord CHANCELLOR. That is not stating an intention to go abroad. You must either swear positively that he is going abroad, or to some declaration that he is. It is not sufficient to swear that another person said so. The rule is, that there must be an affidavit positive to that extent.

The motion stood over for the purpose of filing a proper affidavit. (*a*)

(*a*) *Shaftoe* v. *Shaftoe*, *Dawson* v. *Dawson*, *ante*, 171. 173. *Etches* v. *Lance*, *Post*. {417.}

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[411]

July 14*th*, 24*th*.

WILEY *v.* PISTOR.

Motion by defendant for inspection of letters, referred to by the plaintiff's depositions, as exhibits, refused, with costs.

A MOTION was made for the defendant before the *Master of the Rolls*, sitting for the *Lord Chancellor*, that letters referred to by the plaintiff's depositions, as exhibits, may be delivered to the clerk in Court for the defendant, to be inspected.

Mr. Pemberton, for the Plaintiff, insisted, that the motion was contrary to the course of the Court: the constant rule being, that one party cannot see the exhibits of the other. *Hodson* v. *The Earl of Warrington*. (*a*)

(*a*) 411. 3 *P. Will.* 35.

{(1) See the note to *De Carriere* v. *Calonne*, *ante*, vol. iv. p. 577.}

Mr. Hollist (Amicus Curiæ) said, Lord *Thurlow* refused to allow a deed, referred to by the plaintiff's depositions, to be produced for the inspection of the defendant; saying, if he had a right, he must file a bill.

Mr. W. Agar, in support of the Motion. The practice is according to the case cited, where the party refers to deeds as exhibits: but the exhibits, that are the subject of this application, are mere letters. The reason, that governs the case of deeds, is, that by the inspection you may invalidate the deed. But letters are mere matters of evidence; and the application is reasonable, unless some disadvantage arising from it can be shown.

The MASTER *of the* ROLLS, having consulted the *Register*, who did not recollect any such Order, inclined against the motion; but permitted it to be made before the *Lord Chancellor*. The motion was accordingly made before his Lordship.

For the Motion. The cases of deeds, *Davers* v. *Davers*, *(a)* [412 and *Hodson* v. *The Earl of Warrington*, being cases upon deeds, forming the title, have no application to this case; in which the title cannot be affected. In *Stanhope* v. *Roberts*, *(b)* the production of the draft of a deed was ordered; and in a case before the House of Lords, there referred to, a demurrer to a bill for the discovery of a case submitted by the defendant to his counsel was overruled. In *Gardiner* v. *Mason*, *(c)* a production of letters and papers referred to by the answer was ordered. Under a cross bill this production might be compelled; and it is reasonable, that it should be had without that expense.

Mr. Stratford (Amicus Curiæ) said, a similar motion was refused in *Cooth* v. *Jackson*. *(d)*

The Lord CHANCELLOR. This must be very familiar, if there was not some objection to it; and I never heard of such a motion. It must go much further. At least you must describe the exhibit to be proved *viva voce*: but I do not remember any motion for inspection of such an exhibit.

The motion refused with costs.

(a) 2 *P. Will.* 410. *(b)* 2 *Atk.* 214.
(c) 4 *Bro. C. C.* 479. *(d)* *Ante*, vol. vi. 12.

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[413]
July 24th.

JERVIS v. WHITE. (1)

Equitable jurisdiction to grant an injunction, or order an instrument to be delivered up; though it might be the subject of an action. Discretionary, whether an issue or an action shall be directed or permitted.

AN injunction having been granted against the defendant *White* in this cause, *(a)* a motion was made for the purpose of continuing the injunction, after the answer came in, and to extend it to

(a) 413. Reported, *ante*, vol. vi. 738.

{(1) Cited 3 Desaus. Cha. Rep. 334, *(note.)*}

1802. JERVIS v. WHITE.

the defendant *Bolt*; who was connected with the other defendant by marriage; and had received from him a bill or note for 5500*l.* drawn or accepted in the name of the partnership, and, according to the plaintiff's affidavits, negotiated to *Bolt* immediately, while the order for the injunction was making, in consideration of a debt, due from *White* previously to the commencement of the partnership. *Bolt* had brought an action, and denied notice.

Mr. Mansfield, Mr. Lloyd, and Mr. Pemberton, for the Plaintiff, observed upon the grossness of this case, and contended, that the negotiation of this bill was a contempt; that it was a case of *Lis pendens;* and *Bolt* must have had notice; and, as in *Newman* v. *Milner*, (*b*) the Court would decree the security to be immediately delivered up, without a trial at law. They also cited *Shireff* v. *Wilks*, (*c*) as a clear authority, that a partner cannot be bound by a security given for a debt accrued before he came into the partnership.

Mr. Romilly, and Mr. Wetherell, for the Defendant Bolt, insisted, that this was a subject to be tried at law; and this Court has no jurisdiction to withdraw it from a jury; that in *Newman* v. *Milner*, the question was not, whether a question, already the subject of an action, should be withdrawn from the cognizance of a [414] jury; but, whether the Court should send it to law; and that, if that case went further, it was in opposition to the whole course of the law.

The Lord CHANCELLOR. A different notion seems to have prevailed of late, as to sending cases to law, from that which held formerly. I had always understood, that a bill might be filed for the delivery of a deed, bond, note, or bill of exchange negotiable; and upon the motion for dissolving the injunction it was argued, and much more strenuously at the hearing, that it should go to law; but rather, as the determination of a jury is ancillary to the conscience of this Court administering relief, than as strictly the lawful right of the party. The old jurisdiction of equity, directing issues or actions, except in those instances, in which it acknowledged itself to be ancillary to the law, was exercised upon its own examination; and those cases have been adopted rather as auxiliary to a Court having unquestionably very important means of examining facts, than as the lawful right of the party. Of late it has taken another turn, I agree more convenient to justice. In the great variety of suits in the Court of Exchequer upon policies of insurance, which from the frame of the bill could not be for discovery, though treated as such, but suits for relief, I agree with the opinion of Lord Chief Baron *Eyre*, that the Court could not relieve itself from ordering the instrument to be delivered up, if the parties chose it, instead of the arrangement that now constantly takes place. With respect to suits for notes of hand, bonds, &c. that sort of course has been taken: but it is only within twelve or fourteen years that it has been so general. It is said, you can try every thing at law; the discovery having been given. But

(*b*) *Ante*, vol. ii. 483. (*c*) 1 *East*. 48. *Ex parte Peele, ante*, vol. vi. 602.

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I have considerable doubt, whether there is not sufficient ground for the plaintiff to say, that, after they have tried an action, still, if he chooses, the instrument is to be delivered up; and instead of this species of proceeding, which in many cases the Court would not have permitted, the Court should be assisted in the old way by a proceeding at law permitted under directions and regulations of its own. (1)

I say nothing as to the *Lis pendens* applying to negotiable securities. But the order for restraining the defendant in this case, is not conclusive upon this point. You are obliged to come here for injunctions upon mortgages, conveyances, &c. which I have known three or four deep. But even then, unless the instrument is delivered up, you are not relieved from all danger. The very circumstance, that the holder may compel you to defend yourself against the demand with the expense and vexation attending a suit, is a more reasonable ground for entertaining jurisdiction originally than for departing from the established doctrine. Therefore I do not admit, that this Court will not examine the facts of the case, with a view to determine, whether relief shall be administered or not, merely because an action may be maintained. I agree, when the discovery is obtained, if the facts are contradictory, a Judge sitting here would act rashly if he should not desire the assistance of a jury; and if matter of law arises, unless it is very clear, he ought to take advantage of the assistance he can have as to that. But, if the facts and the law are indisputably clear, I cannot admit, that it is not within the jurisdiction of this Court and the due application of those circumstances to act, not only without sending them, but without allowing them to go to law. At the hearing the Court will determine, whether an action ought not to be tried; but is not bound till the hearing.

Another ground for continuing this injunction is, that the dates [416] and other circumstances, which may be very material, as to the *bona fides* with which *Bolt* received this bill, are very loosely stated in the answer. The circumstances, therefore, require the injunction to be continued, and it is within the jurisdiction to do so. As to depositing the bill of exchange and the letters, it is clear, that under the circumstances admitted in the answer *Bolt* ought to be restrained from negotiating this bill; and, if so, the bill ought to be deposited. *Bolt* ought to have an opportunity of applying for the production of it in all circumstances, in which it may be necessary: the Court taking care, that it shall still continue in the same custody. The letters also ought to be produced. They may be extremely material evidence either here, or at law, if it should be sent there, upon the *bona fides* with which *Bolt* received this bill.

1803. *February* 18*th*.

Afterwards by a further answer, put in upon exceptions, *Bolt* submitted to the relief prayed against him; and by consent, the bill, which had been deposited with the Master, was delivered up to the plaintiff to be cancelled; and *Bolt* was ordered to discontinue his action.

{(1) See *Hamilton* v. *Cummins*, 2 Johns. Cha. Rep. 517.}

1802.

July 24*th*.
August 3*d*.

ETCHES *v*. LANCE.

To obtain a writ of *Ne exeat Regno* the affidavit must be positive as to the intention to quit the kingdom, or declarations to that effect. It is sufficient, that the debt will be endangered; without stating, that it is to avoid the jurisdiction. (1)

No injunction upon belief of an intention to cut timber.

Ne exeat Regno a high prerogative writ.

MR. LEACH, for the Plaintiff, moved for a *Ne exeat Regno*. The affidavit in support of the motion stated, that the sum of 15,000*l*. was reported to be due from the defendant; that the plaintiff was entitled to a certain part of that sum; and that the deponent is informed and believes, that the defendant was appointed to an office under the *East India Company* at *Canton;* and therefore the deponent believes he intends to go abroad.

The Lord CHANCELLOR. Does the Court grant this writ upon belief and information, that the defendant is appointed to a situation abroad, and therefore the deponent believes he intends to go? Must not something more positive be sworn as to the fact of his going abroad, or declarations; and ought not the affidavit to state, that he is going to avoid the jurisdiction of the Court? I have refused the motion, where the affidavit was nothing more than that the deponent verily believes, the defendant is going abroad. I never would grant an injunction upon an affidavit, stating, that the deponent verily believes, the defendant is about to cut timber. The application of this high prerogative writ to these purposes can only be justified by usage and practice. If they will not warrant it under such circumstances, I do not know upon what it is to stand. Lord *Rosslyn* lately considered it in the nature of equitable bail. *(a)*

[418] The motion stood over, to search for precedents, and to get a positive affidavit.

August 3*d*. An affidavit was produced, that the defendant informed the deponent (the plaintiff) that he (the defendant) had that appointment at *Canton;* and that he is going out in one of the next ships to reside there; and the deponent believes, if he quits the kingdom, the recovery of the balance reported due to the plaintiff will be greatly endangered.

Mr. Leach, in support of the Motion. The books do not afford very decisive evidence upon this subject; though inferences may be drawn from them. *Prac. Reg*. 289. *Lloyd* v. *Cardy*. *(a)* *Baker* v. *Dumaresque*: *(b)* in which case he was returning to the place of his abode. All the cases support the inference, that it is sufficient, that the debt will be endangered; though the motive for quitting the kingdom is not to avoid the jurisdiction.

The Lord CHANCELLOR. There are some later cases, of parties, inhabitants of the *West Indies*, going there. *Atkinson* v. *Leonard* *(c)* and the reasoning upon it are very satisfactory. You may take the order. *(d)*

(a) See *Russell* v. *Asby*, *ante*, vol. v. 91.

(a) 418. *Prec. Ch*. 171.

(b) 2 *Atk* 66.

(c) 3 *Bro. C. C*. 218.

(d) *Oldham* v. *Oldham*, *ante*, 410.

{(1) See the note to *De Carriere* v. *Calonne*, *ante*, vol. iv. p. 577.}

1802.

MILLET *v.* ROWSE.

[*420]

July 31st.

Upon a marriage of a ward of the Court, under flagrant circumstances, the husband obtaining license upon a false oath, that she was of age, the clergyman was ordered to attend, and reprimanded: the husband was committed, and ordered to be indicted. Being convicted, and having suffered the punishment, upon his petition to be discharged on executing a settlement the *Lord Chancellor* would not approve a proposal giving him any further interest than, in case of his surviving and no children, under her appointment; requiring the fund to be transferred to the *Accountant General*: with a trust declared to pay the dividends to her separate use for life, from time to time, and not by way of anticipation: after her deceas the capital among all her children by any marriage: if none, and he survives, according to her appointment by will; if no appointment, to her next of kin; and if he survives, subject to her appointment, to her, her executors, &c.

No costs to the husband.

JAMES THOMPSON having been married to *Mary Withers*, a ward of the Court of the age of fourteen, by license, to procure which he took the usual oath, a petition was presented; and the parties, and the clergyman, (a) who performed the ceremony, attending in Court under an order for that purpose, and the young woman appearing evidently to be under age, Lord *Rosslyn*, then *Lord Chancellor*, severely reprimanded the clergyman; and committing *Thompson*, directed that he should be prosecuted. He was accordingly indicted; and convicted; and having suffered the punishment of the pillory and imprisonment he presented a petition; praying, that he may be discharged upon executing a settlement according to a proposal, approved by the Master. His proposal was that the property, to which the infant was entitled, consisting of 1000*l.* stock, should be vested in trustees for the separate use of the infant for life; and after her decease for the children; if there should be no children, and she should survive, in trust for the infant, her executors, and administrators; and if he should survive, for him, his executors, &c.

A petition in opposition was presented by the mother of the infant; making a different proposal.

Mr. Roupell, for the Petitioner Thompson.—Mr. Pemberton, contra.

**The Lord* CHANCELLOR. In a case flagrant as this is, I should have made all the alterations proposed by the petition of the mother. The only settlement I ever will approve is this. Instead of trustees, the fund shall stand in the name of the *Accountant General;* where it will be always safe; and a trust shall be declared for the separate use of this infant for life, to be paid to her from time to time, and not by way of anticipation, during her life: after her decease the capital to go among all her children by this or any other marriage: (a) if she dies without any children in the life of *Thompson*, then according to her appointment by will; and, in case she makes no appointment, to her next of kin. In case he redeems himself by good behaviour during her life, she may give it to him by will. If she does not, I never will let him touch a farthing of it. If she survives him, it shall go according to her appointment by deed or will, and if she makes no appointment, to her, her executors, &c.

When he shall have executed a settlement according to these directions, and not till then, let him be discharged. I shall give him no costs. The costs of the other parties must come out of the fund.

(a) See *Priestley* v. *Lamb, ante,* vol. vi. 421.

(a) 420. *Wells* v. *Price, ante,* vol. v. 398.

1802.

August 2d.

ANDREWS v. EMERSON.

The rule, that an advance of 10 per cent entitles the party to open biddings, not to prevail in future.

MR. STANLEY moved to open biddings upon a lot sold for 800*l.*; offering an advance of 80*l.*; exactly 10*l.* per cent.

Lord CHANCELLOR. That rule of 10 per cent. was not a wise rule to * establish. The consequence is, you never get more. I remember the time, when no such rule prevailed; and I desire it to be observed, that in future there shall be no such rule.

[* 421]

Mr. Stanley then offering 100*l.* the order for opening the biddings was made, upon a deposit of 200*l.* and the usual terms of paying the purchaser all his costs.

[* 422]

ROLLS.

August 5th.

BRANSTROM v. WILKINSON.

Legacy, when the legatee shall attain twenty-one, may be so controlled by the apparent intention as to postpone the possession only, not the vesting; as where it was to two children, when they shall attain twenty-one, to be equally divided between them, share and share alike; appointing their father in trust for the same and trustee for them during their minority; and in case of the death of either the survivor to take the whole; and in case both die in their minority, over.

THE question in this cause arose upon the following clause in a will:

"I give and bequeath to the two twin children of my said niece "*Charles Branstrom* and *Frederick Branstrom* my one Dock share "in the present new Dock at *Kingston-upon-Hull* when they shall "attain the age of twenty-one years to be equally divided be"tween them share and share alike and I appoint *Mr. John* "*Branstrom* the father in trust for the same and trustee for them "during their minority and my will is that in case of the death "of either of them the survivor to take the whole and in case "they both die in their minority I then give the whole Dock "share to my said niece their mother and her heirs for ever."

The testator appointed his nephew *Joseph Wilkinson* sole executor and residuary legatee.

* The bill was filed by the testator's niece and her husband and their two infant children against the executor; praying a transfer of the Dock share. The question was, whether the children had a vested interest before twenty-one. The dividends during their minority were claimed by the defendant. It was admitted, that this Dock share was to be considered as personal estate.

Mr. Johnson, for the Plaintiffs, insisted, that the infants had a vested interest in these dividends, given expressly in trust for them during their minority.

Mr. Richards, and Mr. Horne, for the Defendant.—Nothing is given during the minority of these children. To give the dividends during that period the Court must insert words in the will. The expression, "when they shall attain twenty-one" must be understood "*at*" that age. This is *Debitum et solvendum in futuro.*

There is nothing but the circumstance, that a trustee is appointed; and no case has gone the length, that that alone will do. That appointment might be intended as guardian. A gift to a trustee, in trust for a legatee at twenty-one, is just the same as a gift to the legatee at twenty-one.

The MASTER *of the* ROLLS. There is no doubt upon this point. It is perfectly clear, what this testator intended to postpone was, not the vesting, but the possession. He appoints a trustee. How could there be a trustee for them of nothing? There are many cases, in which notwithstanding the word "when" the interest vested. In *Hanson* v. *Graham (a)* I held, that a bequest in these terms may be so controlled, by expressions and circumstances, as to postpone the possession only, not the vesting. Of what is the father trustee during their minority? I cannot put any other meaning upon those words. He intended to appoint a trustee for them beneficially. [423]

Decree, that this Dock share be transferred to the father upon the trusts of the will.

(a) Ante, vol. vi. 239.

WHITE *v.* WHITE.

ROLLS.
August 9th.

Bequest to poor relations sustained as a Charity.

THE testatrix by her will bequeathed a personal fund, consisting of about 3000*l.* stock, for the purpose of putting out "our "poor relations" apprentices. Afterwards by a codicil she confined it to two families.

Upon a bill to have the trusts of the will carried into execution, *Mr. Richards, for the Defendant*, contended, that this was not a charity; as if it was to the poor in general; being merely a legacy to poor relations; and if not to be supported as a Charity it was void; exceeding the limits allowed by law.

The MASTER *of the* ROLLS. Are not such cases supported as Charities? There was a case of this kind, *Mocatta* v. *Lonsado*, lately before me, where a great number of Jews were the objects. I may execute it as far as I can. I do not know why those who are ready may not be put out apprentices.

The Decree directed such of the objects as were ready to be put out apprentices; and the fund to be laid out from time to time; with liberty to apply.

1802.

ROLLS.
August 10th.

The Court refused a *Prochein Amy* the costs beyond the taxed costs.

OSBORNE *v.* DENNE.

THE Bill was filed by a legatee, entitled also in right of his wife to the residue, on behalf of himself, and as *Prochein Amy* of an infant legatee, now *Mrs. Osborne;* and the usual Decree was made: the costs to be taxed; and to come out of the estate.

Mr. Cooke, on behalf of the Prochein Amy, desired, that in some way he may have costs beyond the taxed costs: either by a direction to have them taxed as between attorney and client, or by a reference to the Master, to see, what extra costs he has been put to; observing, that if this cannot be done, no one will file a bill on behalf of an infant except in the plainest case; admitting however, that this application was against a late decision by the *Master of the Rolls.*

The MASTER *of the* ROLLS. If the *Prochein Amy* is, to a certainty, to have all that exceeds the taxed costs, that leads him to be very careless. The inquiry could be only, what was properly expended. This is a bill filed also by other parties as well as on behalf of the infant; and not purely for her right. I understand the *Lord Chancellor* has said he never will direct such a reference.

Mr. Harvey (Amicus Curiæ) said, Lord *Rosslyn* had directed a reference for this purpose in the case of *Champernoon.*

Mr. Romilly (Amicus Curiæ) said, in the *Attorney-General* v.
[425] *Taylor*, (*a*) a very late case of a Charity, upon a gross breach of trust, the *Lord Chancellor* did make such a direction in favour of the relators in that particular case; as otherwise people would not come forward to file informations; but not laying it down as a general rule.

In Charity cases the Court often gives the relator costs beyond the taxed costs.

The MASTER *of the* ROLLS said, it was often done in cases of Charity.

No order was made.

(*a*) 21st July, 1802.

July 22d, 26th.

RIPLEY *v.* WATERWORTH.

Upon the construction of a deed for the purpose of a partnership real estate held to be converted out and out, into personal. (1)

THE usual Decree was made in this cause for an account of the personal estate of the testator *William Marsh Mears*, received by the defendant, the executor, &c.; and inquiries were directed, among others, what interest the testator had in a freehold estate and sugar-houses, and in leasehold estates, in the pleadings mentioned; and what pews or seats he had in *St. Thomas's* church or chapel; and whether they were to be considered as real or personal estate.

The interest in an estate *pur auter vie* to a man, his executors, administrators, and assigns, beyond the debts, belongs to those, who are entitled to the personal estate. The executor was therefore held a trustee for the residuary legatees.

{(1) See the note to *Bell* v. *Phyn*, *post*, 453.}

The Master by his Report as to the freehold estate and sugar-houses stated, that the testator was seised in fee of three undivided eighth parts of the said estate and sugar-houses; and that by indentures of lease and release of the 11th and 12th of *May*, 1790, the same with the remaining five eighth parts were conveyed to the defendants *William Tennant* and *Thomas Holland*, their heirs and assigns for ever, to the use of such person or persons and for such estate or estates as *Stephen Waterworth*, the testator *William Marsh Mears*, and *Margaret Woods*, should together appoint; and in the mean time as to the testator's three eighth [426] parts to the use of the testator for the purpose of carrying on the trade in partnership with *Waterworth* and *Margaret Woods*, or with such other persons as they should agree to admit as partners; and, in default of such appointment, upon trust that *Tennant* and *Holland*, or the survivor of them, or the executors or administrators of such survivor, should upon the decease of the shortest liver of *Waterworth*, *Woods*, and the testator, or upon the dissolution or cessation of such partnership by any one or more of the said partners, sell the whole of the said sugar-houses and premises, and apply the moneys arising from such sale (after paying off the encumbrances thereon, if any) in discharging such of the joint debts of the partnership as the joint stock of such partnership might fall short of paying; and pay the residue between the said three partners in the proportions following: to the testator, his executors, administrators, or assigns, three eighth parts; and the remaining five eighth parts between the other two partners; and the indenture contained a proviso, that in case there should be no such appointment, as aforesaid, then upon the decease of the shortest liver of the said three partners the two survivors if they should think proper, or such survivor as might think proper, might have and take the part or share of such shortest liver as well of the said sugar-house and premises as of the implements, utensils, and fixtures, therein described at the prices following: *viz.* of such buildings, additions, and improvements, as may hereafter be erected or made thereon, at such price as may be laid out in building or making the same; and of the sugar-houses and premises as then enjoyed, with the implements, &c. at the rate of 3200*l.* for the whole; upon condition, that such price should be paid to *Tennant* and *Holland* within six months after the decease of such shortest liver.

The Report further stated, that by indentures of lease and re- [427] lease, dated the 1st and 2d of *February*, 1792, other messuages and buildings adjoining the sugar-houses were conveyed to *Tennant* and *Holland* and their heirs to the same uses. The Master did not find, that any appointment was made by the three partners; and after the testator's death, which happened on the 11th of *October*, 1792, *Waterworth* gave notice according to the proviso, that he elected to become the purchaser of the testator's three eighth part of the premises; which he purchased accordingly. The Master stated his opinion upon the circumstances, that the testator had a chattel interest in the said freehold estate and sugar-houses.

1802.

RIPLEY v. WATERSWORTH.

The Report also stated, that *Thomas Mears*, the testator's late father, was at his death possessed of a lease of four houses with warehouses and other buildings and a piece of ground at *Copperas Hill*, of another lease of three houses and a warehouse in *Paradise Street* and *Manesty Lane*, and another lease of houses and parcels of land in *Park Lane* and *Frederick Street*, all in *Liverpool*, to *Thomas Mears*, during the lives of three persons and the life of the survivor, and after the decease of the survivor to *Thomas Mears*, his executors, administrators, and assigns, during the further term of twenty-one years. *Thomas Mears* died about *December*, 1773, intestate; leaving the testator, and *Mary Ripley* deceased, the late wife of the plaintiff, and the defendant *Catharine Mercer* his only children and next of kin. The testator took out administration to his father. In 1776 the testator agreed with the corporation of *Liverpool* for a renewal of the lease of the premises at *Copperas Hill;* and accordingly by indentures, dated the 18th of *January*, 1776, the corporation in consideration of 40*l.* demised to the testator, as sole administrator of his father, his executors, administrators, and assigns, those premises for three
[428] lives and the life of the survivor, and after the death of the survivor to the testator, his executors, administrators, and assigns, for the further term of twenty-one years, at the yearly rent of 0*l.* 12*s.* 6*d.*

The Report further stated, that the testator purchased the interest of *Mercer* and *Ripley* and their wives in the premises at *Copperas Hill;* who by indentures, dated the 1st of *May*, 1788, assigned, conveyed, and released, all their interest respectively, to hold to the testator, his executors, administrators, and assigns, in such manner as *Mercer* and *Ripley* in right of their wives were entitled. The testator having also in 1784 agreed for a renewal of the premises in *Paradise Street* and *Manesty Lane*, upon a fine of 67*l.* by indentures of lease and release, dated the 19th of *January*, 1784, the corporation made a similar demise to him of those premises; and he also purchased the interests of his sisters in those premises; and in 1788 in the same manner renewed the lease, as to those premises. By indentures, dated the 31st of *March*, 1791, the corporation of *Liverpool* made a similar lease of a piece of land, called the *Sandhole*, with other premises in *Liverpool*, to the three partners, as tenants in common; which premises were by a memorandum endorsed to be held as to three eighths by the testator, three eighths by *Waterhouse*, and two eighths by *Margaret Woods*. The Master then having stated his approbation of contracts for the sale of part of the property, certified his opinion, that the testator had a chattel interest in the said several leasehold estates.

The Report also stated, that the testator had two seats in *St. Thomas's* church in *Liverpool*, one of which descended to him as heir at law, of his maternal grandfather, who was one of the original proprietors of the church, and as such had the seat allotted
[429] to him; and the other descended to the testator as heir at law of his father; who purchased it; and the Master stated, that both the said seats were to be considered as freehold estate. (1)

{(1) *Bates* v. *Sparrell*, 10 Mass. Rep. 323.}

Exceptions were taken to the Report by the defendants *Mercer* and his wife, and *William Ripley*, an infant; stating as to the said freehold estate and sugar-houses, that the Master ought to have certified, that the testator had a fee simple estate; and that the money received by the sale belonged to his heir at law; and, as to the leasehold estate for lives, that the Master ought to have certified, that the testator had a real or descendible estate and interest of freehold in the said several leasehold estates; and that the same belonged to, or descended upon, the heir at law.

The residuary legatees, the defendants *Stephen* and *Frances Waterworth*, contended, that the leasehold estates, having passed by the will, which was not attested by three witnesses, were to be applied, as personal estate disposed of by the residuary clause, and not as upon an intestacy. In that point they were opposed by the next of kin.

Mr. Mansfield, and Mr. R. Smith, Mr. Richards, and Mr. Hollist, the Solicitor-General, and Mr. Bell, for different parties, in support of the Exceptions.—The question upon the first exception is, whether this is a trust of real estate for the heir at law; or whether by the deeds, that were executed, it was converted into personal estate. It is to be considered real estate at the death of the testator, upon this short principle; that what was not at that time absolutely converted either in law or equity, but merely to answer a particular purpose, for which a conveyance was to be made, remains real estate. For any particular purpose, [430] to which the produce is destined, it must of course be personal estate: but as between the representatives it remains real. This case, though the question arises upon deeds, is like the late cases upon wills; directing the conversion of real estate into personal; and yet, if the purpose, for which the conversion is to be made, does not exist in the life of the testator, and the disposition by the will fails, so that there is no reason for the conversion to answer the purposes of the will, in the view of this Court the estate remains real for the benefit of the heir.

The last case of that sort is *Collins* v. *Wakeman;* (a) in which all the cases upon the point are referred to. That was as strong a case for defeating the right of the heir as could be imagined: yet it prevailed. The words in this deed, with regard to the payment of the money, are mere words of course: "executors, administrators, or assigns;" and the inference is, that the words "heirs" and "executors," &c. were used indiscriminately, as meaning representatives. The liberty of preemption to the surviving partner is strong to show, that till then it continued real property. The clear object of the framers of this deed was, to let in the debts of the partnership, as well as any other encumbrances upon the estate. The power of sale was only in aid of the other funds, to pay the partnership debts; and could only be intended to suit the exigencies of the trade. There was no necessity for exercising it. There was a use executed in the testator for the

(a) *Ante*, vol. ii. 683. See also *Brown* v. *Bigg*, *ante*, 279, and the references, and *Bell* v. *Phyn*, the next case.

1802. RIPLEY v. WATERWORTH. purpose of carrying on the trade in partnership. It must be real or personal in all events. Whether the legal or equitable fee was in * the testator at his death, in one event, it could not be personal estate. Suppose he had not died first, and the estate had been sold: the only object of a sale would have been to pay the encumbrances, and the debts of the trade; which might have been done by a charge; and the residue would have been real estate in him. In *Hewitt* v. *Wright* (a) Lord *Thurlow* observes the difference between a charge and residue; that a charge is personal from its first creation; but a residue continues real till converted. (b)

[* 431]

The interest, which is the subject of the second exception, also belongs to the heir; and cannot go as personal estate by this unattested will. In *Westfaling* v. *Westfaling* (c) Lord *Hardwicke* said, it would go to the executor as special occupant. (d) That is singular upon the Acts of Parliament, the Statute of Frauds, (e) and *Mr. Fazakerly's* Act; (f) and is in opposition to the authority of *Dyer*, *Roll*, and *Comyns*; that being an estate of freehold, it cannot go to the executor as special occupant. It is quite anomalous, if an executor in that character can take freehold estate. But the present question is not that; but, whether this lease for lives can pass by an unattested will; being made by the law clear personal property. Lord *Redesdale* could not discover any case in which that point was decided. It would be directly against the Statute of Frauds; the expression of which being "any estate "pur auter vie," without any qualification, it is impossible to say, it can be devisable in any other manner than with three witnesses. Afterwards the special occupancy of the heir is noticed. By the

[432] other Statute it is distributable among the next of kin, as personal estate: but it is not made personal estate; and the same word "devise" is used. All the authorities treat this as real property, though not an inheritance, a descendible freehold: *Low* v. *Burron*, (a) *Oldham* v. *Pickering*, (b) *St. John's College* v. *Fleming*, (c) *Williams* v. *Jekyl*. (d)

The Attorney-General, Mr. Fonblanque, and Mr. Whishaw, for the Report.—The doctrine of the Court, upon the point arising on the first exception, after fluctuating some time, is now settled by *Ackroyd* v. *Smithson*, (e) *Walker* v. *Denne*, (f) and the succeeding cases; and the general doctrine is deduced by Lord *Alvanley*, from the various decisions, in the late case of *Wheldale* v. *Partridge*; (g) referring to your Lordship's argument in *Ackroyd* v. *Smithson*, and to *Ashburner* v. *Mac Guire*. (h) The point upon which *Ackroyd* v. *Smithson* was determined, is, that, supposing all the legacies lapsed, the heir might have called for a conveyance.

(a) 1 *Bro. C. C.* 86. (b) 1 *Bro. C. C.* 90. (c) 3 *Atk.* 460.
(d) 3 *Atk.* 466. (e) Stat. 29 *Ch. II.* c. 3. s. 12.
(f) Stat. 14 *Geo. II.* c. 20. s. 9. (a) 4$2. 3 *P. Will.* 262.
(b) 2 *Salk.* 464. *Carth.* 376. (c) 2 *Vern.* 320.
(d) 2 *Ves.* 681. (e) 1 *Bro. C. C.* 503. (f) *Ante*, vol. ii. 170.
(g) *Ante*, vol. v. 388. (h) 2 *Bro. C. C.* 108.

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This estate was under a contract of sale, and the price stipulated, provided, the persons having an option chose to take advantage of it. This provision was not by any means made merely with a view to the exigencies of the trade; but that the interest of the deceased partner should be absolutely converted, and there should be an end of the trade, whether these persons should choose to purchase, or not. The words "executors, administrators," &c. are material to show the intended quality of the estate. The intention manifestly was to convert out and out. Certainly at the [433] death of the testator it had the quality of real estate: but the purpose required conversion. In all the cases the trust resulted in respect of the title of the heir, provided he should answer the paramount purpose; as in the instance of a devise charged with debts, &c. The consequence of the construction contended for would be a tenancy in common, destructive of the business. The primary object of this conversion was to pay the debts, and then to pay over to the executors, not to the heir; and the purpose required the conversion, to prevent the consequence of the surviving partners being entangled by a tenancy in common with the heir; which might have interfered with the purpose of carrying on the trade. Even if there should be no debts, the property is to be sold.

Upon the second exception, the most sensible and reasonable construction is to consider the persons pointed out as entitled to take. Why is not an executor to be considered special occupant as well as an heir at law? In *The Duke of Devon* v. *Kinton (a)* *the Lord Chancellor* took it, that even before the Statute of Frauds, if an estate *pur auter vie* came to an executor or administrator, it would be assets. The Statute providing, that, if there is no special occupant, it shall go to the executor, it would be strange, that, where it is given expressly to a man and his executors, it should not go to the executor. The fair construction of the latter Statute is, that either in the case of no devise or a devise intended to pass the property, but not executed according to the Statute of Frauds, it is to be distributed as the personal estate of the testator or intestate. If there is a special occupant, the case is beside the Statute; and that there is, *Westfaling* v. *Westfaling*, following the case in *Vernon*, is an authority. In *Oldham* v. *Pickering* there was no [434] special occupant: the limitation being to a man and his assigns; and therefore the administrator was immediately within the Statute. The purpose of the Statute of Frauds was confined to making it assets; and it was not distributable till the latter Statute. The executor then as special occupant takes it as personal estate, chargeable with the debts, and subject to application as personal estate after the debts paid. Lord *Hardwicke*, and Lord *Kenyon* in *Atkinson* v. *Baker*, *(a)* describe it as personal estate. It is charged then with all the considerations and duties attaching upon personal estate; and the constant usage has been so to consider it.

Mr. Mansfield, in Reply.—With respect to the first exception, this estate cannot be considered converted out and out. This is

(a) 2 *Vern.* 719.

(a) 434. 4 *Term Rep.* 229.

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quite unlike the cases of absolute contract, depending upon the principle, that what is to be done is considered as done. The expression "executors, administrators, or assigns," is used very inaccurately.

As to the second exception, there is not a hint, that the executor takes as special occupant, till it was mentioned by Lord *Hardwicke* in the case referred to; the decision of which did not require it. The reason assigned in *Comyns* and other books, why he cannot be special occupant, is a reason of tenure, producing that singular thing, which remains to this day, general occupancy; *viz.* that there would be no occupant liable to the Lord for his services and duties before probate of the will. No such thing is to be found in any of Lord *Coke's* works, or any other old book. It is no where converted into personal property: but by the Sta-

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tute of *Geo.* II. it shall go and be distributed as personal estate; and it is made deviseable only with three witnesses.

The Lord CHANCELLOR. Upon the subject of the first exception I am strongly inclined to think, this is personal estate; being of opinion, that upon the true construction of the deed the parties had contracted with each other, that, when the partnership should be determined, whether by the act of the parties or of God, the property should be converted to all intents and purposes. There is an obvious difference from all the cases; which establish this general principle, that where a person dealing upon his own property only has directed a conversion for a particular special purpose, or out and out, but the produce to be applied to a particular purpose, when the purpose fails, the intention fails; and this Court regards him as not having directed the conversion. But, first, this is a case, in which, not an individual gives directions by will or other instrument as to his individual property, but three persons are contracting with each other as to what is to be done with property of a very peculiar nature. By the deed it is to be considered part of capital or stock in trade. The subject, I admit, is real; but combined with a great number of fixtures, utensils, and implements; many of which are personal. There being three parties, it was rational that they should so engage: and that, when the partnership should cease, the property should by mutual agreement be disposed of; as should be most beneficial to all of them. It was beneficial, that the whole should be sold out and out at the end of the concern, rather than that each individual third part should be brought to market. My idea upon the whole deed is, that a partnership was proposed between these persons, entitled to this property in eighths. It was necessary they should bring

General principle, that where a person dealing upon his own property only has directed a conversion for a particular purpose, or out and out, but the produce to be applied to a particular purpose, when the purpose fails, the intention fails; and this Court regards him as not having directed the conversion.

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in capital; and have a place for carrying it on; to purchase utensils, &c.; in which they were to have similar interests, as in the houses, for the benefit of the trade, though many of them were personal; and they agreed to carry on the business as long as it should be their pleasure. The question is, whether three persons engaging in a purchase of real property, such as this, and to be applied to such purposes, might not, and did not, contract, that, if the partnership should be dissolved by the act of all or the death

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of one, it should be all sold together for the purpose of producing more benefit upon the sale. There is another purpose, very rational; a stipulation, that, if this concern should cease by one partner choosing to go out, the others wishing not to dissolve the partnership, but to go on, should have liberty to purchase the share of him retiring, for a certain, fair, valuable consideration. So, in the case of death. There is an obvious inconvenience, if two wishing to go on should not be able to compel the third to sell, but should be entangled with him as landlord of that share; provided they could prevail upon him to demise it. The question therefore is, whether three persons, having interests as tenants in common, and looking to these events, the death or retirement of one, might not contract in this manner, in order to make the most of property, though real in a strict sense, yet commercial in its nature, to sell it altogether; and upon this deed, though extremely inaccurate, I think, such an intention appears; and the meaning upon the whole is, that if the surviving partners chose to buy the share of the deceased or retiring partner, to be estimated according to the proviso, they should have that option to buy out his interest in that manner. [*437]

Property held converted under the effect of a contract by relation; though the actual conversion depended on a contingency, not in the option of the owner; and did not take place during his life.

In a case before Lord *Kenyon*, at the *Rolls*, upon the 15th of *February*, 1785, *Whitmore* demised to *Douglas* * for seven years, with a covenant, that, if the tenant, after the 29th of *September*, 1761, and before the 29th of *September*, 1765, should choose to purchase the inheritance for 3000*l*. *Whitmore* would convey to him. In 1761, before any election, *Whitmore* died; and left all his real estate to *Bennet* in fee, and all his personal estate to *Bennet* and his sister equally as tenants in common. In 1765, before the time mentioned, *Waller*, who purchased the lease and benefit of the agreement from *Douglas*, called on *Bennet* to convey for 3000*l*.; which conveyance was made in consideration of that sum. Afterwards the sister and her husband filed a bill against the representative of *Bennet*, claiming a moiety of the 3000*l*. and interest, and it was decreed accordingly; and though the testator could never have compelled the lessee to purchase, yet, when the assignee made the election, it was held the personal estate of the testator, and not to belong to the devisee of the real estate.

Another case was there mentioned. A man having a timber estate, agreed to sell a given quantity *per annum*, to be chosen by the vendee. The owner died; and a vast deal of timber was cut after his death; and that timber, though in the option of the buyer, was held to be the personal estate of the party to the contract. That is a very strong case.

As to the other question, it is singular that it falls to me to decide it for the first time. It is impossible that the exception can be right, in stating that it descended upon the heir. I always understood that this was a freehold; though the word "*descendible*" has been inaptly applied to it; (*a*) for though he is described as heir, he does not take as such, but as a special occupant named in the grant. An opinion of Mr. *Booth*, treating up- [438]

(*a*) Co. Lit. 239.

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on what have been inaptly called intails and contingent remainders, notices the impropriety of that: every person named or described by the term "heirs," &c. being merely a special occupant: that description ascertaining the person to take, not by descent, but as named in the grant as special occupant. It was never doubted, that it was in a sense a freehold estate. It must be taken, either that the executor may be special occupant, or not. If the reasoning to prove that he cannot, is sound, it follows, that a grant to *A.* his executors and administrators, must be construed as if those latter words were not inserted. If so, it is directly within the Statute of Frauds and the other Statute together; for then there is no special occupant whatsoever; and the Statute of Frauds will directly attach; and it will go to the executor or administrator, because there is no special occupant; and at least is personal estate to the extent of being assets. In the case in *Salkeld*, the question arose in a Court of law between the Statute of Frauds and the other Statute, whether the Court would compel him to do more than to pay the debts. The decision, as far as it goes, is, that the Court would not interfere further. Yet I doubt whether an executor or administrator ever takes any thing as such, that he would not be bound to apply as personal estate of the testator. That doubt is founded upon this; that, when the last Statute passed, it did not recognise that case as well decided; treating it only as raising a doubt; reciting expressly, that doubts had arisen. It is clear, that after that Statute, if an executor or administrator is incapable of being a special occupant, they cannot hold for their own benefit any part of the personal estate taken under the Statutes. It is equally clear, that, as far as the party dies intestate, it is not by force of the will, but of the Statutes,
[439] that the distribution is to be among the next of kin; and unless the doubts recited by the Statute are ill founded, the consequence is clear, that the exception, as taken, cannot be allowed; for it would prove, that, if this had arisen before the last Statute, and the executor was incapable of being special occupant, it would have gone to the executor to the intent to pay the debts; and then the question would have arisen here, whether there was any trust for the heir. It would be very difficult to maintain that; and either the executor must have kept it himself, or it must have been laid hold of in a scramble. In the case in *Peere Williams*, *(a)* in the note, it is said, it is distributable in Chancery. That fortifies the doubt, that this Court has always considered that what an executor or administrator takes as such is clothed with a trust of that kind; and that confirms the proposition, that it is not to go to the heir. The Statute of *Geo.* II. orders a distribution, if this Court would not: if it would, there are two authorities to take it from the heir.

An ulterior and different question is, whether, if this is taken from the heir, it is to go as the personal estate undisposed, or with that which is disposed of; and not by the mere effect of the disposition, but by the accumulated effect of the will and the

(a) 2 *P. Will.* 382, note *(a.)* See also *Witter* v. *Witter*, 3 *P. Will.* 99.

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Statute, or rather the Statute disposing to the same purpose of what is undevised as what is devised. It is not a great stretch, though hazardous, to say, the Statute meant to apply both to testacy and intestacy. The difficulty is, that both those cases must have been contemplated; for if the executor gets it by the Statute of Frauds, there must have been a will; if the administrator, in all probability an intestacy: and that Statute has both expressions. [440] If the legislature intended in all cases, either of intention to dispose, or not, to give it to the next of kin, they would probably not have used any other expression than "distributed:" not "shall go, be applied, &c." So "the personal estate of the "testator" is a singular expression; for upon the construction now pressed it would have been sufficient to have said, "if the party "dies intestate."

Executor may be a special occupant.

All I have said is upon the notion, that an executor cannot be a special occupant; which is a strong assertion now from the authority in *Vaughan* and the other considerable authorities; and Lord *Hardwicke* in *Westfaling* v. *Westfaling*, treats him as capable of being so. It might be be said, he is a species of special occupant; and the law in early periods might struggle against general occupancy to say, that by relation when appointed he should take from the general occupant; and considering, that the grant itself affects to give it to executors, there is not much favour due to the objection, that the executor as executor shall not take under the grant of the grantor.

Stock bequeathed by a will without two witnesses, is subject, in the hands of the executor, to the directions of the will; even for the purpose of a residuary bequest.

But the question remains, if he does take as executor, has or has not this Court considered him as taking for the benefit of those, who take the personal estate? In the case of intestacy the administrator does take for the benefit of those, who would in that case take it. Whether that reasoning will enable the Court to say, that an executor, who will not be permitted in this Court to take for his own benefit, shall apply it for the benefit of those, who gave him the character of executor, is new. I rather incline to hold it. The case of stock affords some analogy. Under all the acts stock cannot be given by will except with two witnesses: yet this Court often considers it given without witnesses; and for the purpose of a residuary bequest. Lord *Thurlow* has said, the executor takes it as executor; but takes it still under the * will: yet it is expressly against the Statutes requiring expressly two witnesses. He reasoned it thus; that the will was a direction to the executor how to apply it; though it was not devised by that will. [* 441]

July 26th.

The Lord CHANCELLOR. This case is involved in great difficulty of form, as well as turning upon one or two considerable questions. The Master's Report does not answer the inquiry. The Master was only to state, what the interest was. The reference also ought to have been to state, what deeds, &c. were executed; and the Court ought to have reserved to itself the question as to the right to the property. The Master has reported, that this property was a chattel interest.

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The considerations are very different, whether it is a chattel interest, or a freehold interest in this Court clothed with a trust for persons claiming the personal estate. I do not wonder, that in framing the second exception, great difficulty was found, what expression to apply to this sort of property; for upon the cases I have found it very difficult to determine, under what phrase to describe this interest. If I had been aware of the importance of the point upon the second exception, I should have called in the assistance of the *Master of the Rolls*. The question seems to me to be new: what is to become of the property in a leasehold estate for lives, originally granted to a man, his executors, administrators, and assigns, beyond the point of the payment of the debts. I take it to be thoroughly settled, that a leasehold estate for lives, if of a freehold character, when so granted, is assets for the payment of simple contract debts; and, in this respect at least, [442] this freehold is distinguished from all other freeholds. But it has never been decided in *specie*, what is to become of such an interest, so granted, after the debts paid. The case in that respect is new; and the point difficult; for every Judge has avoided a decision upon it.

I am clearly and decidedly of opinion, that the last proposition of this exception, that these estates belonged to, or descended upon, the heir at law, cannot be maintained. In every view of it, and subject to all the difficulties belonging to the question, my opinion is, that if the executor is not a trustee for the next of kin or those taking under testament the personal estate, he has himself a better right than the heir; and, without going through all the cases, it might be made out by unquestionable authority, upon a reason analogous to those given in the species of case, that I am about to mention. Where a tenant *pur auter vie* had made a lease for years, and the lessor died before the under-lease expired, the *Cestui que vie* still living, the lessee for years would in that case take the estate itself; for to occupancy there are necessary a vacant possession, and a filling up of it by some person, who meant to occupy; and no one could enter upon the lessee for years. Therefore if he chose to say, his lease should merge in the freehold, the estate would be full of him; and he would take it as his own. So the executor being in possession of the estate, and the estate full of him, it is impossible that he can be a trustee for the heir. The heir is therefore quite out of the case; and the question is between those claiming under the testament and the next of kin, and the executor, except as to the twenty-one years; which interest is clearly personal estate; and passes by the will.

Tenant *pur auter vie* made a lease for years; and died during that lease, living the *Cestui que vie*. The lessee for years would take the estate itself.

Requisites to occupancy: a vacant possession, and a filling up of it by some person, who meant to occupy.

This question upon the authorities is involved in great doubt [443] and obscurity. First, without presuming to state which of the authorities are most conclusive, there appears to be great countenance given in many books to the same sort of difficulty in making the heir a special occupant, as in making the executor one; for if this is a descendible freehold, the heir takes by descent; and, that it is so in a sense, is excessively difficult to deny upon

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Vaughan's very learned and able argument, (a) alluded to in all the books upon this subject, and particularly noticed in *Mr. Hargrave's* note. (b) *Vaughan's* expression is very like that in *Seymor's Case*. (c) *Vaughan* says, (d) "The heir hath it not as a "special occupant; for if so, such heir were an occupant; which "he is not; for a special occupant must be an occupant; but he "takes it as heir, not of a fee, but of a descendible freehold; and "not by way of limitation, as a purchase, to the heir, but by de-"scent;" &c. He then cites *Bracton*, to prove, that an assize of *Mort d'Ancestor* might be maintained by the heir. Lord *King* seems also to think, that the question, as a question of assets, must be considered both with reference to taking as special occupant and in some other character. (e) Lord *Coke* in *Seymor's Case* says, he is special occupant, but in a manner. In other books it is said, that he is not only special occupant, but he takes by descent. I do not quite understand this sort of language. But with this sort of language as to the title of the heir, it is a clear fact, that, long previously to the Statute of Frauds, the observation of the Courts was thrown upon the effect of these grants of an estate to a man and his assigns, to a man, his executors, and assigns, or his executors, administrators, and assigns. That Statute upon reading it does not appear intended to apply to such grants. From the early cases the question seems to have arisen, [444] whether these estates were deviseable; and it was held, that they were not; though they had a descendible nature about them. Upon the Statute the observation is very proper, that if the executor was considered as special occupant, as the heir was, it is very singular, that there is no express provision as to estates so granted to executors. If previously the executor was considered as being the special occupant, or "in a manner," or "as it were," special occupant, this Statute has not said, what is to become of the estate, in case there is such a special occupant; but only, in case there is no special occupant; and then only declares, that it shall be assets in the hands of the executor, or administrator. It is necessary therefore to inquire, what was conceived upon this subject previously to the Statute; which is to be collected from the older books. The passages are referred in the more modern books. Most of them are in *Westfaling* v. *Westfaling*; and I have found Lord *Hardwicke's* judgment upon that case. *The Duke of Devon* v. *Kinton*, first, before Lord *Cowper*, (a) and afterwards before Lord *King*, (b) was, according to the Report in *Vernon*, a lease, in which originally the grant was to a man and his heirs, in the sense, in which those words are used as special occupant: but in *Peere Williams* it appears originally granted to trustees. The heir however might be in a sense represented as special occupant of the equitable interest. The counsel seem to have been taken to be clear, that, if permitted to go to the ad-

(a) *Holden* v. *Smallbrooke*, *Vaugh.* 187. (b) *Co. Lit.* 41. *b.* note 241.
(c) 10 *Rep.* 95. (d) *Vaugh.* 201.
(e) *Duke of Devon* v. *Atkins*, 2 *P. Will.* 380.
(a) 444. 2 *Vern.* 719. (b) *Duke of Devon* v. *Atkins*, 2. *P. Will.* 380.

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ministrator without devise, it would be assets for payment of debts generally. The *Lord Chancellor* states, that it is made personal estate. The difficulty upon that is, what is the nature of the estate in the executor? Is it freehold? If so, how is it assets for simple contract debts? If it is to be considered assets *for simple [*445] contract debts, as personal estate, and the effect of the Statute is to be laid out of the question, upon what principle is it personal estate to the extent of paying simple contract debts, and no further? It is difficult to know, how a principle of law can work that distinction; though a Statute might. But the Statute is laid out of the question; and upon the whole reasoning it is intimated, that it would be so, because it is personal estate. In what sense personal? Upon the executor's death who would take it? If he dies without an executor would it go to the administrator *de bonis non?* Would it go to the representative of the executor? That is left in doubt. Would it be freehold estate in the man who first got possession? That is left in doubt. But the clear opinion of Lord *Cowper* was, that, whatever was the nature of the interest, it was, independent of the Statute, assets for all creditors generally. It does not rest upon that authority only: that case coming afterwards before Lord *King;* and the account of Lord *Cowper's* opinion in the argument of Lord *Talbot* being, not only that the estate was assets, but that it was distributable. The difficulty upon this case is, that, when it is said, the premises are personal estate as naturally as if limited originally to executors, that involves as much difficulty as the question, what is to become of the estate, if granted originally to the executor; and all the doubts, that I before stated, occur upon that. What is to become of it, if the executor dies without a representative? Is the administrator *de bonis non* to have it: the executor of the executor, &c.? All that is left undetermined by the language of these cases.

The case of *Oldham* v. *Pickering*, in a great many books, was also a case long before the Statute of *Geo.* II. and therefore does not at all determine what would have been the opinion of the [446] Court, if it had been subsequent to that Statute. That was an original lease to a man and his assigns *pur auter vie.* There was no assignment of it: therefore it is directly within the Statute. The Judges were of opinion, the Statute made it assets for debts: but beyond that they left it just where it was. But it is to be observed, that is a case, to which none of the doctrine of this Court, as applied to grants originally made to a man, his executors, administrators, and assigns, could be applied; for that is a case, in which the executor is treated as being a special occupant; and this Court has considered him with reference to that, and also as being personal representative. It was their own by force of the Statute, not the grant; and therefore that had nothing to do with the question, if that grant had originally contained the word "executors." I am not surprised, that great difficulty occurred to them upon the point, what would become of it after the debts paid. It is not easy to determine that in case of the death of the executor. In *Carthew*, Lord *Holt* even doubts, whether it

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would not be assets for legacies; and if so, it is very difficult to say, it would not for the residue; which is in the nature of legacy. By the note in *Peere Williams* to *The Duke of Devon* v. *Atkins*, which note being in the first edition of that book, is of some authority, it seems to have been the opinion of the author of that note, that there was an equity to say, if the executor or administrator took it as special occupant, the effect of his character, as executor or administrator, should fix upon his legal title as such an equity for those, who claim the personal estate, to make him a trustee.

In *Westfaling* v. *Westfaling* it appears, from Lord *Hardwicke's* notes, that several points were made. It was heard in *May*, 1746; and his Lordship took time till the 13th of *April*, 1747, to consider. *The Duke of Devon* v. *Kinton* was cited; and there is a reference "*Quod vide;*" which I understand as a hint to himself to refer to the original case. Great stress was laid upon that decision. The case was argued very fully; and it was insisted, that an estate *pur auter vie* to a man, his executors, administrators, and assigns, was assets for debts before the Statute. Lord *Hardwicke* says, there are four questions: two of law; and two of fact. First, as to the advowson, he held an advowson in gross to be assets by descent at common law for specialty debts, upon the authority of Co. Lit. 374. *b.* Sir *Thomas Jones*, *Robinson* v. *Tonge*, (a) (1) before Lord *King*: in which the general question was referred by the Lords; and all the Judges agreed, that an advowson in fee simple is assets in the hands of the heir for the debts of the ancestor. Secondly, as to the lease *pur auter vie;* he held such a lease to *A.* and his heirs, was within the Statute of fraudulent devises as to specialty creditors: plainly within the words and meaning; and he agreed with Lord *Cowper*, 2 *Vern.* 719: and he further declared, that a lease *pur auter vie*, where there is no special occupant, though devised, is by the Statute of Frauds, assets in the hands of the executor to pay debts generally; for that Statute in effect made him special occupant in all such leases, as if inserted therein. Lord *Hardwicke* then refers to 2 *Roll. Ab.* 151, (b) and Lord *Cowper's* judgment in *The Duke of Devon* v. *Kinton*, and the reasoning of Lord *Holt* in *Oldham* v. *Pickering*, and in *Carthew*. In the case in *Roll's Abr.* it seems held, that an executor might be a special occupant; and a case (c) immediately follows, in which it is said the executor shall not be a special occupant, because it is a freehold; which cannot descend to the executor. Lord *Redesdale*, in an opinion I have seen, says, great confusion has arisen upon that by not referring to a case in *Dyer;* (a) from which it is collected, that the executor is treated clearly as having a freehold estate. But still, if a freehold, it is in contemplation of this Court a freehold, that has got into the executor; and the question is, whether he holds it as freehold for his own benefit in this Court. If the executor is to be con-

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Advowson in gross assets by descent at common law for specialty debts.

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(a) 3 *Bro. P. C.* 556. 3 *P. Will.* 398. (b) 2 *Roll's Ab.* 251, *G. Pl.* 2.
(c) 2 *Roll's Abr. G. Pl.* 3. (a) 448. *Dy.* 328. *Pl.* 10

{(1) Overruled in *Aldrich* v. *Cooper*, 8 Ves. Jun. 382.}

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sidered as special occupant, the Statute takes no notice of him as such. I do not know how to state the principle, that the executor is to be considered a special occupant, better than it is expressed in *Bacon's* Abridgment; (b) which has brought all the subject together; and which is very well filled up, as to the late cases, by *Mr. Gwillim:*

"If a lease be made of land to *J. S.* his executors and assigns, "during the life of *B.* the executors of *J. S.* shall be the special "occupants, if he dies in the life of *B.;* for though it be a freehold, "which in course of law would not go to executors, yet they may "be designed by the particular words in the grant to take as oc-"cupants: and such designation will exclude the occupation of "any other person; because the parties themselves, who origin-"ally had the possession, have filled it by this appointment:"

No special occupancy of a rent; being an incorporeal hereditament: but if the heirs, &c. are named in the grant, the executor is said to be *quasi* occupant.

And the reasoning is analogous to rents; of which, being an incorporeal hereditament, there could be no special occupant. Therefore, if it was granted to *A.* during the life of *B.* by the death of *B.* there is an end of the grant: but if to the heirs, &c. then it is said, the executor should be *quasi* occupant: that is, he should take under the appointment and designation of the grantor, the person having a right to designate who should take it.

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*Then, as to the Statute 14 *Geo.* II. we must look a little to the history of the law for the intention of it. First, suppose this sort of grant to *A.* his executors and administrators, during the life of another, not at all within the Statute of Frauds: if so, it should seem not to be within the Statute 14 *Geo.* II. If it is to be said in this sense to be within the former, in the words of Lord *Hardwicke*, "that, where it is granted without mentioning the executor, "the effect of the Statute is to make it go to the executors and "administrators, as if they were named," then you take this circumstance, that between the two Statutes the question had arisen, what was to become of such an estate under the effect of the Statute of Frauds; and the Court was of opinion, the executor or administrator as such could keep it against an application in a Court of law, notwithstanding any claim of the next of kin or under a will in the Spiritual Court. That opinion, however, was doubted. Lord *Holt* doubted, whether legatees should not take it; and very considerable doubt was entertained in this Court upon the subject. The Statute was therefore made to exclude all doubts. First, take it, where the executors and administrators were not named: the doubt was, to whom it was to go after the debts. It seems, the legislature would have left the matter very short of a rational and prudent purpose, if they had said simply, it should go among the next of kin. How is it to go among them, supposing there was no other claim? If one dies, he took it as personal estate: does it become real estate afterwards? If more than one: is it to be divided; and each *aliquot* part to become freehold? Was it intended, that in all cases, where there was a will of personal estate generally, unless executed with three witnesses, it should not touch this interest: which as to the claim of the next of kin would be personal estate? I have a

(b) 2 *Bac. Ab.* 277.

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strong inclination, that the meaning was, that the residuum of such an estate should go with the rest of the personalty, where there was a will; and to the next of kin, where there was an intestacy; and that the language of that Statute would bear out that; and it would be more extraordinary, that persons claiming by bequest should not have been attended to, when upon the Statute of *Charles* II. Lord *Holt* doubted as to legacies. The question is, whether, if the executor has the interest, as in the nature of a freehold, he is not a trustee in equity for the persons taking the personal estate; and a will, not attested by three witnesses, will give them a title to call upon him for their benefit; he having the interest in him; and the interest not having passed from him. I think, that is the case in a Court of equity; for I cannot think, how it should be, that such a property in an executor, independent of any Statute assets for simple contract debts, from the fact, that it is in him as executor as well as special occupant, does not give that title; because it has in him the nature of personal estate. If so, I cannot state the principle for saying, it should be personal estate to the point of giving creditors a claim upon it, and no further. The character of executor still remains in him. He is no less executor, because afterwards he is special occupant. If the character of executor raises a trust in him, and an interest in others, to that point of giving interests to all who can claim it as personal estate, it is personal estate. This was the opinion of Lord *Cowper*, and of *Mr. Peere Williams;* and it would be a whimsical state of the law, that, considering it freehold, it should be in the power of the ordinary to dispose of it *ultra* the debts. To the heir it could not go, for the reasons I have stated. It must therefore remain with the creditor. The opinion of Lord *Hardwicke* also, to a very considerable extent, is in favour of this. All admit, it would be assets for debts; and in *Williams* v. *Jekyl*, Lord *Hardwicke* says, "The estate is a term for three lives, not [451]
"created originally as a descendible freehold, to go to the heir as "special occupant, but to the lessee, her executors, administra-"tors, and assigns; so that the executor of the first lessee must "take this as a special occupant under the limitation." (a)

Lord *Hardwicke* seems to consider it for that as personal estate. Lord *Kenyon* also seems to consider it personal. But if not, it must now be determined, what is to become of it. If he takes it beyond the debts, as special occupant, then, if he should not have an executor, (for an administrator *de bonis non* is not sufficient under the original grant) would an administrator *durante minore ætate* take it? A second executor would be one taking it for his own benefit, without any description of persons to take after his death. Then if he dies during the life, his case would fall directly within the terms of the Statute of Frauds; and it would be assets for his debts; and then under the Statute 14 *Geo.* II. would go to his next of kin. It would be very extraordinary, that, if such an estate was given to *A.* his executors, administrators, and assigns, and he should die, his executor pay-

(a) 2 *Ves.* 683.

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ing the debts should hold it entirely for his own benefit; but, if that executor should die, his executor should take it under the two Statutes; and by the first Statute pay the debts, and by the other hand it over to the next of kin of the first executor.

There is very arduous difficulty in this. But, I rather think, in equity such a freehold estate, originally granted to *A.* his executors, administrators, and assigns, though deviseable as to the legal interest only with three witnesses, has been considered as belonging to those who take the personal estate, by an equity attaching upon the character of the executor as executor; and there [452] is extreme difficulty in saying, the administrator should take for his own benefit. It is the same as the case of stock; which is to be disposed of by will only with two witnesses: but Lord *Thurlow* said, where it is not so bequeathed, devolving upon the executor, it devolves upon him as executor, in trust for those who are entitled to the personal estate. This is according to the idea of Lord *Redesdale;* and that is confirmed by a conversation I had with his Lordship, which produced a passage in the Legacy Act; *(a)* for it was necessary to consider, how the duty was to be collected upon estates *pur auter vie;* where they happened to be personal estate; and a clause was introduced into the Statute, that they should be valued: the Legislature leaving, as they found it, how much was to be personal estate.

Upon this case, therefore, I am of opinion, that this interest can in no event go to the heir; that it does not belong to the administrator; and, as to the point between the next of kin and the residuary legatees, that the executor is in this Court a trustee for those to whom the testator has given the personal estate by a will sufficient to pass personal estate; and therefore he must be considered as holding it for the residuary legatees.

Upon the other question, this is to be distinguished from the cases of disposition, being a case of contract; and the value of the property enjoyed as real estate during the partnership; for it could be in no other form; and the contract applying to every purpose of a testator at liberty to dispose with reference to the obligation of his contract, I am of opinion, it is personal estate.

Declare, that the money arising from the sale of the sugar- [453] houses and premises, &c. is to be considered as personal estate; and that, with regard to the leases *pur auter vie*, the produce of those estates is in like manner to be considered the testator's personal estate. They remain freehold estates to the purchasers undoubtedly.

(a) Stat. 36 *Geo.* III. c. 52. sec. 20.

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ROLLS.

July 20*th*, 26*th*.

BELL *v.* PHYN. (1)

Real estate purchased with a partnership fund held to have descended to the heir against the claim of the residuary legatee. (2)

Bequest to the testator's three children to be equally divided between them, share and share alike, but in case of the death of any without being married and having children, the share of such child so dying to be divided between the surviving children, and so if one should only survive: one being married and having a child, her share vested.

Exoneration of the heir from a mortgage, the personal debt of the ancestor. (3)

JAMES PHYN, *Alexander Ellice*, and *John Inglis*, carrying on business in partnership, *Phyn* in one-third, the others in unequal shares, as merchants in *London*, in 1791 joined with *George Shand* in the purchase of a plantation in the island of *Grenada*, with the stock, &c. for the sum of 25,000*l.*; of which sum 4000*l.* was paid immediately out of the partnership funds of *Phyn*, *Ellice*, and *Inglis;* and the remainder of the purchase money was secured by bond and a mortgage on the estate. The estate was accordingly conveyed, and the stock, &c. assigned, subject to a term for 2000 years, in trust to secure 21,000*l.* to *Shand*, his heirs, executors, administrators, and assigns, respectively; and *Shand* conveyed and assigned to *Phyn*, *Ellice*, and *Inglis*, their heirs, executors, administrators, and assigns, respectively, two-thirds of the estate and stock, subject to the payment of 12,666*l.* 13*s.* 4*d.* the residue of the consideration for their two-thirds; which sum they severally and respectively covenanted to pay. The accounts relative to the estate were kept in the partnership books. Further payments were made from time to time out of the partnership funds till the death of *Phyn;* at which time only 4000*l.* of the principal of the purchase money remained due. He died in *December*, 1800; and by his will, dated the 26th of *October*, 1800, after giving 1000*l.* a-year to his wife for life, a legacy of 500*l.* and all his household goods, and other * specific articles, and giving his son 6000*l.* he disposed of the residue thus: "As "to all the rest, residue and remainder of my personal estate or "effects, of what nature or kind soever the same may consist, I "give and bequeath the same equally between my three children, "*George*, *Jane*, and *Catharine*, to be equally divided between "them, share and share alike: but it is my wish and desire, that "in case of the death of any of my children (without being mar-"ried and having children) the share of such child so dying shall "be divided between the surviving children; and so if one of my "children should only survive."

The testator left his widow and the three children mentioned in the will surviving. His daughter *Jane* married *William Bell*, and they having one child, and the other daughter, filed the bill against the testator's son, who was his heir at law, and one of his executors, and against the widow and the other executors; praying an account of the personal estate, &c.; that the sums of 7500*l.*

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{(1) This case, and *Balmain* v. *Shore*, 9 Ves. Jun. 500, were decided at the Rolls. But Lord *Eldon*, says *Mr. Belt*, in a note to *Thompson* v. *Dixon*, 3 *Bro. C. C.* 199, has decided differently, in cases where the real estate has been purchased in whole, or in part, with partnership funds. He refers to the case of *Selkrigg* v. *Davies*, 2 Dow's P. C. 231, where Lord *Eldon* said, "his own individual opinion was, that all "property involved in a partnership concern "ought to be considered as personal." The case determined by him is *Townsend et al.* v. *Devaynes et al.* reported alone in the *Appendix* to *Montague on Partnership*, p. 97.}

{(2) *Goodwin* v. *Richardson*, 11 Mass. Rep. 469. *Forde* v. *Herron*, 4 Munf. 316. See *Pitts* v. *Waugh et al.* 4 Mass. Rep. 424.}

{(3) See *Cumberland (Duke of)* v. *Codrington*, and *Livingston* v. *Newkirk*, 3 Johns. Cha. Rep. 229, 312.}

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and 500*l.* produced by the sale of the testator's interest in the *Grenada* estate, which took place by agreement, and subject to the question, may be declared to be part of the personal estate, that one-third of the residue may be paid to the plaintiffs *Bell* and his wife; and that the other two-thirds may be secured, and the interest paid to the other plaintiff, and the defendant *George Phyn* respectively, with liberty to apply for the principal, when they shall respectively marry and have children, or die without being married and having children.

The heir, by his answer, insisted, that the estate formed no part of the capital of the partnership; and submitted, that the sums of 7500*l.* and 500*l.* belonged to him as real estate; and that [455] as heir at law he was entitled to have the testator's share of the 4000*l.* remaining due of the purchase money, being one-third of two-thirds, paid out of the personal estate.

The widow, by her answer, insisted upon her right to dower.

Mr. Romilly, and Mr. Steele, for the Plaintiffs, insisted, that the money produced by the sale of this estate, which the heir admits to have been purchased with the partnership property, was personal estate.

Upon the other point, they contended, that the share of *Mrs. Bell* under the will was vested: the gift to the children being absolute in the first instance; and the condition performed.

Mr. Richards, and Mr. Stanley, for the Defendant George Phyn, and Mr. Hart, for the Widow.—This is not a question with creditors. The plantation was purchased by these partners to their separate use, independent of the partnership. In this estate, therefore, they were as among themselves interested in thirds. The creditors of the firm had no claim upon it as partnership property. The only difference between this case and *Thornton* v. *Dixon (a)* is, that in this the estate was purchased by, and conveyed to, the partners as a new purchase; and was paid for out of the partnership fund. It is simply the case of a man who has bought a freehold estate with part of his partnership property; and left it to descend. *Smith* v. *Smith (b)* is a strong case certainly.

[456] *Mr. Romilly, in Reply.*—This case is argued, as if, there being so much clear profit from the partnership, they had agreed to invest it in real estate; and taken it in equal thirds. But it is admitted, that the fact is directly the contrary; that, though the estate was conveyed to them in equal thirds, they were not so entitled, but in the same proportions as in the partnership. They were in fact, notwithstanding the conveyance, trustees for the partnership. In *Smith* v. *Smith*, after all the facts stated, how was it possible to consider that partnership property? The *Lord Chancellor* went expressly upon the agreement. What difference arises, whether the estate purchased with the partnership property is conveyed to one partner only, or to all, but not for the same interests, in which they are entitled to the partnership property? In the latter case, they are equally trustees. Where is there, in this case, such a special agreement? The general doctrine stated

(a) 3 *Bro. C. C.* 199.

(b) *Ante*, vol. v. 189.

in *Thornton* v. *Dixon*, the real name of which case is *Thompson* v. *Dixon*, is correct; and Lord *Redesdale* said, he had many notes to the same point. Suppose this partnership had turned out a losing concern; and it had been necessary upon *Phyn's* death to call upon his representative: would it not have been said, the real estate was to go to his heir; and his personal estate was to make up that demand? Yet that circumstance can make no difference as to this transaction; which was not upon any settlement of their partnership accounts. For what purpose was any account kept in the partnership books, unless this was partnership property? All merchants open distinct accounts of every adventure.

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The MASTER *of the* ROLLS. Suppose this was partnership property, I doubt whether the consequence is a conversion. There was no occasion to call for it for any of the purposes of the partnership. It remains clear. Each might have entered into the enjoyment of his share. Then suppose all die: why is it to be considered personal property, something different from what it really is, as between the real and personal representatives? (a)

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June 26th.

The MASTER *of the* ROLLS. Upon the first point, I doubt whether there is quite enough admitted by the heir, to show that the estate at *Grenada* could be considered in a proper sense partnership property at the death of *Phyn*. But even if it can be so considered, upon the authority of the case before Lord *Thurlow* I am obliged to decide in favour of the heir. That case, as it appears in the Register's Book, does not differ materially from the Report. The buildings, &c. upon one piece of the land, were purely for the purposes of the trade. The other piece of land likewise was purchased for the purposes of the trade; and held by the partners in the shares and proportions in which they were interested in the trade. *Joseph Dixon*, one of the partners, had before his death acquired five-tenths, one-half. He died, leaving a widow, a son, and a daughter. The son was let in, and received half the profits. Upon his death, the daughter was let in, and received half the profits. She married the plaintiff, and executed a conveyance upon trusts, the last of which was to her husband in fee. Upon her death, he insisted upon the conveyance to him of her half of those two pieces of land. The widow, by her answer, insisted, that the moiety of the profits was wrongfully received by her son and daughter: the buildings and premises purchased for the purpose of the trade, being, as well as the stock, to be considered a chattel: one moiety therefore constituting part of the personal estate of *Joseph Dixon*. Then, if it was to be considerdered real estate, she insisted upon her title to dower. But she was interested in having it considered personal estate. The question therefore was whether it was to be considered real or personal estate. The decree, pronounced at some distance from the hearing, was, that it was to be considered real; and the plaintiff was entitled to his wife's moiety under the settlement.

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(a) *Ripley* v. *Waterworth*, the preceding case, and the references.

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That authority therefore goes the full length of the point for the heir; for, even if this was partnership property, there was nothing done by the partners to alter the nature of it. This sum, therefore, for which the estate sold, must be considered of the nature of real estate; and there must be a reference to the Master to settle the widow's dower.

The expression "without "being married" in a will construed according to the common acceptation "without having ever been "married."

The word "children," legally construed, is confined to legitimate children.

"And" construed "or" to give effect to all the words.

Another question was made, whether in the event *Mrs. Bell* took a vested interest in her share of the residue under the will of her father. I am of opinion, the expression "without being "married" must be construed, "without having ever been mar-"ried." Lord *Alvanley* in *Maberley* v. *Strode (a)* says, that is the common acceptation of the word "unmarried." As to the other expression "and having children," it may be contended, that, though she cannot now die unmarried within the meaning of this clause, yet if she dies without leaving children, the share shall go over: for the word "and" must be taken to be "or;" as it was in the case I have mentioned. *(b)* Indeed the contingency of * dying unmarried and without children, cannot properly be said to mean any thing more than the latter event; as legally speaking there can be no children without a marriage. Therefore to give effect to all the words it is almost necessary to construe the copulative as disjunctive.

Supposing that done, the question is, what the testator meant by dying without having children. These words admit of different constructions; which are stated in *Pinbury* v. *Elkin. (a)* The first is out of the question here: the word being "children." The

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third sense, a person dying without leaving issue at the time of his death, undoubtedly is the only construction, that can be put upon these words, wherever the interest is limited to the parent, and the capital to the children, but given over, in case the parent dies without children. Then it must mean, if there are none at the death of the parent; for then the provision is intended to be made. But, by this will nothing is in any event given to the grand-children; but every thing in the first instance to the children: whether to remain with them absolutely, or to go over, is made to depend upon a contingency; which is that of having children: either having them born, or leaving them at his death. It is not very reasonable, that if his children should have children, who should live to require an expensive education, or to contract marriage, it should be out of the power of the parent to touch the capital for either of those purposes, on account of the possibility, that the children might die in the life of the parent; though the only consequence of surviving the parent would be, not that the children would take any thing, but, that the parent might dispose of the whole as he thought fit. The intention was to enable

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the parent to make a provision for the children; which might be in the life of the parent as well as after the death; that if the children should live to marry and have children, they will require

(a) *Ante*, vol. iii. 450.

(b) See other cases referred to in the note, *ante*, vol. iii. 452. *Weddell* v. *Mundy*, *Turner Moor*, *ante*, vol. vi. 341. 557. *(a)* 459. *P. Will.* 563.

more than the income; and then the capital shall be at their disposal: but, if they should not live to marry or have children, then it shall go over. This is the most likely construction; and does no violence to the words according to the case in *Peere Williams*. In the event, that has happened, therefore, *Mrs. Bell's* share is vested.

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There is no question as to the exoneration. It remains the testator's debt. (a)

(a) See *Waring* v. *Ward*, *ante*, 332, and the references.

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RAINSFORD *v.* TAYNTON.

TAYNTON *v.* HANNAY.

Before the *Lord* CHANCELLOR. *March* 9th.

ROLLS. *July* 26th, 27th.

Administration granted under Statute 38 *Geo.* III. c. 87; where the executor went to *Scotland*.

It cannot be disputed in this Court; though it may at law.

Though not for a limited time, it is for a limited purpose; *viz.* being made defendant to suits in equity.

The effect of the return of the executor, in this instance the executor's executor, is, that he must be made a party in the usual course; and then the temporary administrator may account, have his costs, and be discharged: but the proceedings had are not put an end to.

JOHN HANNAY died in *India*, in *September*, 1795, having by his will given one-third of the residue of his estates to his niece, *Jane Hannay*, one-third to *Mary Hay*, and the remaining third to his brother, *Johnston Hannay;* whom he appointed his executor.

In *March*, 1798, *Johnston Hannay* proved the will; and went to *Scotland*, where he resided. Soon afterwards administration with the will annexed of *John Hannay*, was granted to *Nathaniel Taynton*, under the late Act of Parliament (b) for the administration of * assets, in cases, where the executor, to whom probate has been granted, is out of the jurisdiction. In *Michaelmas* Term, *Jane Hannay* having married *Thomas Rainsford*, they filed a bill against *Taynton*, and against the other residuary legatees, for an account; and to have a Receiver appointed. A Receiver was appointed; and the usual decree was made on the 21st of *March*, 1799.

Alexander Hannay died in *India*, in 1782; having bequeathed all the residue of his estate to his brothers, *William*, *John*, *Ramsay*, and *Johnston Hannay*, to be divided equally between them; and appointed his brothers, *Samuel*, *John*, *Ramsay*, and *Johnston Hannay*, and *John Levett*, his executors. In 1783, *Samuel Hannay* alone proved that will. *Ramsay Hannay* received the personal estate of *Alexander* in *India;* and remitted part to *Samuel Hannay;* who died intestate; and upon the return of *Ramsay Hannay* he was compelled to take probate of the will of *Alexander*. A bill was filed by *Taynton*, and the Receiver appointed by the decree, against *Ramsay Hannay*, as executor of *Alexander*, and against *Johnston Hannay*, as one of his residuary legatees, and others, for an account of his estate and payment of *John Hannay's* fourth of the residue. Other suits were instituted, and great litigation ensued, both at law and in equity, upon the affairs of *Alexander Hannay*, and cross demands between the estate of *John Hannay* and *Ramsay* and *Johnston Hannay*. In

(b) 38 *Geo.* III. c. 87.

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November, 1799, *Taynton* was cited by *Johnston Hannay* to the Prerogative Court for the purpose of setting aside the administration obtained under the Act of Parliament: but it was confirmed. *Johnston Hannay* died in *Scotland;* having never returned to *England.* By two instruments in writing, according to the law of *Scotland*, dated the 16th of *August*, 1794, and the 12th of *March*, 1800, he conveyed all his real and personal estates to his
[462] widow, and *William* and *Ramsay Hannay*, and others; of whom *Ramsay Hannay* alone proved the said instruments or will, in *England.*

This bill was filed by *Taynton*, as administrator under the Act of Parliament, against *Ramsay Hannay* and two other executors of *Johnston Hannay*, (the rest being out of the jurisdiction,) *Rainsford* and his wife, and *Hay* and his wife; praying, that the decree in the cause of *Rainsford* v. *Taynton* may be established and carried into effect against *Ramsay Hannay* and the other executors of *Johnston Hannay*, with regard to the residuary share of *John Hannay's* estate, to which *Johnston Hannay* was entitled; as if *Johnston Hannay* has been a party to the decree; praying an account of the dealings and transactions between *John Hannay* and *Johnston Hannay*, and that the balance may be ascertained, an account of the personal estate of *John Hannay* come to the hands of *Johnston Hannay*, and of *Johnston Hannay's* personal estate; and that, in case the Court shall be of opinion, that *Ramsay Hannay* is to be considered as executor of *John Hannay*, capable of acting as such, proper directions may be given with regard to the plaintiff's administration and the suits instituted by him. The bill stated various dealings between *John* and *Johnston Hannay;* in respect of which the latter was much indebted; that he possessed the personal estate and sold part of the real estate; which was admitted by the answer; and that if *Ramsay Hannay* is the executor of *Johnston Hannay*, he ought to be made a party to the cause, *Rainsford* v. *Taynton*, by supplemental bill; and in all events as personal representative of *Johnston Hannay;* and that the several persons claiming to be his executors, and to have an interest in the residue, ought likewise to be parties; but that *Rainsford* and his wife refuse to institute a suit.

[463] *Ramsay Hannay* by his answer stated, that a considerable balance was due to him from the estate of *John Hannay;* and he submitted, that the administration ought not to have been granted to the plaintiff, *Johnston Hannay* not being out of the kingdom, or out of the jurisdiction of the Courts of law and equity, being domiciliated in *Scotland;* and the affidavit, on which the administration was obtained, not being agreeable to the form prescribed by the Act of Parliament; being obtained without the knowledge of *Johnston Hannay;* and further submitted, that the administration upon the death of *Johnston Hannay*, and in the event of the defendant's becoming his personal representative as aforesaid, ceased and became void: the defendant having become the executor of *Johnston Hannay;* who was the sole executor of *John Hannay;* and the defendant residing in *England* ought, as

such executor of *Johnston Hannay*, to be considered executor of *John Hannay*, and capable of acting as such notwithstanding the act; and the said decree ought not to be established against this defendant, nor the accounts taken, &c. without first making him a party as the personal representative of *Johnston Hannay;* and that the plaintiff ought to be restrained from acting accordingly.

A motion was made on behalf of *Ramsay Hannay*, that he being now resident within the jurisdiction, one of the executors, who has taken probate of the will of *Johnston Hannay*, the executor of *John Hannay*, may become and be made a party to the suit of *Rainsford* v. *Taynton*, pursuant to the act, as the legal personal representative of *John Hannay;* and that *Taynton* may account for what he has received; and pay the balance into Court.

Mr. Mansfield, Mr. Richards, and Mr. Fonblanque, in support of the Motion, insisted, that the act, which provides, that the party is to swear, that the executor hath departed this kingdom, and is out of the jurisdiction of the Courts of law and equity, has not provided for the case of a person being in *Scotland.* The ground of the application to the Ecclesiastical Court for the administration, that the executor was out of the jurisdiction of the Courts of law and equity here, is true: the executor being in *Scotland.* The administration is expressly limited by the act to the purpose of being made a party to bills in equity, and to carry decrees into effect. Though the act provides for the return of the executor only, the construction must extend to his executor, who is in law to all intents the executor of the original testator. If any answer was required from *Ramsay Hannay* as to the effects of *John Hannay* possessed by the executor, that might be an objection to this application, to be substituted in the decree for the account: but an answer has been put in, with schedules, stating all the accounts. Upon the action in the Court of Common Pleas, (a) Lord *Alvanley* was of opinion, there was an end of the administration. The other two Judges were of a contrary opinion. In fact, *Ramsay Hannay* had not then obtained probate of the will of *Johnston Hannay.* The point therefore, whether the probate does not completely determine the temporary administration, has not been before the Court of law. But how is it possible for this fictitious administrator to maintain an action; considering the express limitation in the act to the purpose of maintaining suits here? The whole object of the act is gone, when there is an executor here capable of maintaining a suit in equity. [464]

Mr. Alexander, and Mr. Owen, against the Motion.—The object of this motion seems to be, that all the proceedings instituted in the name of *Taynton* should abate, and be at an end. He was obliged to file a bill in this Court; having brought an action with a view to compel *Ramsay Hannay* to account; who filed two bills in the Exchequer to restrain that action. Whenever another representative comes in, the course of the Court, independent of the act, requires, that he shall be made a party; which can be on- [465]

(a) 3 *Bos. & Pul.* 26.

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ly by supplemental bill. The probate obtained in this case was supplemental matter; and a supplemental bill has been filed in the cause of *Rainsford* v. *Taynton*, for the mere purpose of bringing him before the Court. A distinct suit was absolutely necessary for an account of *Alexander Hannay's* estate. That suit and the action, both which are necessary for winding up the affairs, which are the subject of this suit, instituted by the residuary legatee, would be determined, if this application succeeds. It is matter of discretion for the Court to continue this suit.

The Lord CHANCELLOR. This motion is, that *Ramsay Hannay* may become and be made a party to this suit. By what means am I to make him a party upon the Record? It also prays, that the temporary administrator may account for what he has received, and pay the balance into Court; founded upon the 5th section of the act. If this person answers the description of an executor within the act, being executor of the executor, he must be made a party; not by a short order; but it is incumbent upon the plaintiff in the suit to find the means, consistent with the state of the Record, of bringing him before the Court. If he had been originally a party, he must be served with process. This is a dry question upon the construction of an act, calculated to relieve a grievance that had been long felt. How can a man, being in *Scotland*, be stated to be without that relief in law, or
466] equity, mentioned in the first section? The Ecclesiastical Court have thought he was; and have taken an affidavit, not according to the terms of the act, and granted administration. Notwithstanding that, the question would be with a Court of law, whether the administration was well granted: but it is not with me. I have no discretion about it. The object of making an administrator, under this act, is purely to make him defendant to bills in equity. It does not strike me, that he could bring an action, or have one brought against him, unless for the purpose of this limited administration; which would enable him to answer the exigency of any decree in this Court. Upon that footing, this is a bill against this administrator for a distribution of the assets; and the Court thought it reasonable to let him try to recover by action debts due to the testator. There is a sort of power in the act to appoint a Receiver. (a) I am clearly of opinion, no decree will add to his authority to sue at law, if this administration does not give that right. Suppose this was not the executor of the executor: you could not come here for a short order: you only put upon them the necessity of making him an executor in proper form; and if he is the executor of the executor, there is no other way than by supplemental bill. As to determining the administration by the return of the executor, if having the power to sue he has got the effect of the suit, and the account has proceeded nearly to a report, it would not be very wholesome to say the construction of this act is, that, because the executor is to be made a party to the suit, in which the administrator remains a

(a) Sec. 4.

party, the administrator is forthwith to cease to be accountable, and to be discharged. Then, is an executor of an executor within the act? I am not sure of which opinion I should have been upon that. But I cannot agree, that it belongs to the Court of Chancery to say, *whether the administration is gone, or not; for if it is gone at law, he is not administrator here. If the right way of making this person a party is by supplemental bill, whatever is the construction of the act, the individual, who, it is insisted on both sides, ought to be before the Court, is before the Court.

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The Motion was not granted. The cause of *Taynton* v. *Hannay* afterwards came on at the Rolls.

Mr. Alexander, and Mr. Owen, for the Plaintiff.—Mr. Richards, and Mr. Fonblanque, for the Defendant.

The MASTER *of the* ROLLS. Upon this case, I am of opinion, it is not competent to the defendant to bring into discussion the validity of the administration granted by the Ecclesiastical Court; and if it was, that Court has acted according to the intendment of the act, to provide a method of proceeding in the Courts of this country, where executors are out of the jurisdiction of those Courts. On the other hand, within the true meaning and construction, though perhaps not the strict letter, *Hannay* is to be considered as an executor returned, and within the jurisdiction, and capable of acting as such. The question is, what effect the return has in the suit and upon the administration. It is contended for the defendant, that the administration is completely at an end: an administration during the absence of an executor. Certainly upon general principles *of law an administration during a particular period, or until a particular event, determines at that period, or, when that event happens. When the Ecclesiastical Court in the exercise of its ordinary jurisdiction grants administration during the absence of an executor, it is at an end the instant he returns. In *Slater* v. *May*, (a) it was held, that the administrator *durante adsentiâ*, &c. plaintiff, in his declaration ought to aver, that the executor is out of the realm.

July 27th.

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Administration during a particular period, or till a particular event, determines at that period, or on that event: for instance an administration during the absence of an executor; and the administrator ought in his declaration to aver, that the executor is out of the realm.

But under this act the administration is, not for a limited period, but for a limited purpose: *viz.* to become and be made a party to a bill or bills in equity; and to carry the decree or decrees into effect. Resting there, it seems, as long as any of the purposes of the decree are to be carried into effect, the administration must be kept on foot. But it is contended, that, taking the whole together, that could not be the intention; and it is said, the executor returning must be substituted for the temporary administrator. Thus much is certain, that the suit is not to fall to the ground, to be at an end by the return of the executor. It is

(a) 2 *Ld. Raym.* 1071.

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to go on; he being made a party. To make him a party seems properly the business of the plaintiff. I do not understand, why the plaintiff has not taken the necessary steps for that purpose: an administrator *ex officio* insisting upon being permitted to carry on suits for *Mr.* and *Mrs. Rainsford;* who will not even take the pains of bringing the executor before the Court. But, however that might be, a limited administrator, placed as he is in a new situation by the return of the executor, may file any bill that is necessary. He may, if the executor is to be substituted, take the steps necessary for that purpose. He may require the accounts

[469] of his administration to be taken; and that a provision shall be made for the costs. But, when that is done, his connexion with the estate and the suit is at an end; and I cannot conceive, that it was intended, there should be both an executor and an administrator of the same estate, prosecuting and defending suits relative to that estate. Very clear words in the Act of Parliament would be necessary to induce the Court to sanction so anomalous a proceeding. If the executor is before the Court as such, his character must be that of complete executor, exclusive of any co-operation by an administration. The fifth section of the Act provides, that if the executor, capable of acting as such, shall return to or reside within the jurisdiction pending the suit, he shall be made a party; and the costs incurred by granting administration, and by proceeding in such suit against such administrator, shall be paid as the Court shall direct. That seems to imply, that the moment the returned executor is made a party, the Court may ascertain the costs. The administrator then is discharged, and has nothing more to do with the suit. To the extent of effectuating the substitution, he must be permitted to act: but that he should continue to act as administrator, and to act in suits, after a capable executor is returned, would be contrary to the express terms of the Act, and all legal analogy.

A decree was made; directing an account of the receipts of *Hannay*, and of all costs in prosecuting and defending suits as to *John Hannay's* estate, and the bill was amended, by substituting *Rainsford* as plaintiff instead of *Taynton.*

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ROLLS.

July 19*th*, 27*th*.

THOMSON *v.* THOMSON.

A contract for sale of the command of an *East India* ship is illegal; and therefore cannot be enforced by suit upon the equity against the fund paid by the Company as a compensation, under the regulation of 1796, to restrain the practice in future. (1)

Payment to an agent is payment to the principal. (2)

BY articles of agreement between *William Thomson* and his brother *George Thomson*, dated the 5th of *December*, 1770, reciting, that *George Thomson*, late commander of the ship *Calcut-*

{(1) See the note to *Hartwell* v. *Hartwell*, *ante*, vol. iv. p. 811.}

{(2) *Taber* v. *Perret et al.* 2 Gallison's Rep. 565.}

ta, in the service of the *East India* Company, had resigned the command thereof in favour of *William Thomson*, it was witnessed, and *William Thomson* covenanted with *George Thomson*, that he, *William Thomson*, should, during so long time as he should continue to be commander of the said *Calcutta* Indiaman, pay to *George Thomson*, his executors, &c. an annuity of 200*l.* as therein mentioned; and further, that in case *William Thomson* should at any time hereafter quit the service of the Company or resign the command of the said ship, he should, to the good liking of *George Thomson*, his executors, &c. cause and procure the next succeeding commander of the said ship either to pay such sum as should, in the judgment of *George Thomson*, his executors, administrators, or assigns, be deemed a full and fair equivalent, price, or satisfaction, for said annuity of 200*l.* or otherwise to bind and oblige himself, his heirs, executors, and administrators, to continue the payment of said annuity of 200*l.* during so long time as he should continue to command said ship; and also upon his resigning or quitting such command, to bind and oblige himself to pay such sum of money as in the opinion of two skilful and disinterested persons, to be chosen in manner therein mentioned, should be deemed a fair satisfaction and compensation for said annuity; and *George Thomson* thereby agreed, that he, his executors, &c. should stand possessed of and interested in all and every sum and sums of money, which should be paid to or received by him or them in pursuance of the articles in trust for the benefit of his two sons *George* and *William Thomson* as therein [471] mentioned.

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THOMSON *v.* THOMSON.

George Thomson, the eldest son of *George Thomson* the elder, having attained the age of twenty-one in 1785, and his brother *William Thomson* the younger in 1787, their father assigned to them all his interest under the articles. *William Thomson* the elder becoming a bankrupt, his nephews obtained an order to prove under the Commission the arrears of the annuity. Afterwards *William Thomson* the elder having obtained his certificate, and being appointed commander of the ship *Lord Thurlow*, which was taken up by the Company in the room of the *Calcutta*, and insisting that he did not remain liable to the annuity, an action was brought for the arrears; and a judgment was obtained against him; and the amount levied under an execution. From that time the annuity was paid up to *Christmas*, 1800; when another commander was appointed to the *Lord Thurlow; William Thomson* having relinquished the command, and quitted the service. Under the regulation adopted by the *East India* Company, in 1796, to prevent the sale of commands of their ships, an allowance was made to *William Thomson* the elder of 3540*l.* of which 2040*l.* was secured by the bonds of the Company, delivered to *Archibald Paxton*, agent for *William Thomson;* and the remainder was to be paid when the *Lord Thurlow* should return to *England*.

The bill was filed by *George Thomson* the younger; praying, that the money upon the securities received from the Company may be invested in securities to satisfy the annuity of 200*l.*; and that such annuity may be paid to the plaintiff and the defendant

1802. THOMSON v. THOMSON. *William Thomson* junior, until the compensation for the same shall be paid; and that the value of such annuity or the * compensation may be ascertained, and paid out of the money allowed by the Company to the defendant, *William Thomson* senior; and, in the meantime that the bonds may be secured.

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Mr. Piggott, and Mr. Cox, for the Plaintiff.—The only case against this bill is *Blachford* v. *Preston;* (*a*) the principle of which is extraordinary; considering this as a public office. That case is also to be distinguished upon the circumstances. This cannot be considered a public office: neither is there any fraud in the transaction; and under the circumstances there is a clear remedy in equity. Upon the confession in the answer, it is impossible that the defendant can keep this money; of the payment of which, though asserted in his answer, he has never produced any evidence; and the answer is replied to. The plaintiff goes against the fund. The defendant has received the compensation, in respect of which this payment is due; and the plaintiff, to whom he was bound to make it, comes here: stating, that it is against all conscience, that he should keep that fund.

Mr. Romilly, for the Defendant, took two objections: first, that there is no equity; but a mere action of covenant: secondly, that the contract was illegal. Upon the second objection, the rule Courts both of law and equity have taken, is, that upon such transactions they will not interpose: *Melior est conditio possidentis.*

The MASTER *of the* ROLLS. In *The East India Company* v. *Neave*, (*b*) the late *Lord Chancellor* held the same doctrine as in the case cited; that this is an illegal agreement. There is an

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equity against the fund, I admit; if you can get at it by a legal agreement. The defence is very dishonest: but in all illegal contracts, it is against good faith as between the individuals to take advantage of that. A man procures smuggled goods, and keeps them, but refuses to pay for them. So in the underwriter's case, an insurance contrary to the Act of Parliament, the brokers had received the money, and refused to pay it over; and it could not be recovered. (*a*) (1) No matter, who complains of it: the thing is illegal. You have no claim to this money, except through the medium of an illegal agreement; which, according to the determinations, you cannot support. I should have no difficulty in following the fund; provided you could recover against the party himself. If the case could have been brought to this, that the Company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person; who could not have set up this objection as a reason for not

Upon a contract for smuggled goods, though they are received, the money cannot be recovered. So upon an illegal insurance contrary to the Act of Parliament, though the money was received by the broker, it cannot be recovered.

(*a*) 8 *Term. Rep.* 89. (*b*) *Ante*, vol. v. 173. See page 181.

(*a*) 473. *Ex parte Mather, ante*, vol. iii. 373. *Watts* v. *Brooks, ante*, vol. iii 612. *Vandyck* v. *Hewett*, 1 *East.* 96.

{(1) See *Russell* v. *De Grand*, 15 Mass. Rep. 35.}

performing his trust. *Tenant* v. *Elliott* (b) is, I think, an authority for that. But in this instance it is paid to the party; for there can be no difference as to the payment to his agent. Then how are you to get at it, except through this agreement? There is nothing collateral; in respect of which, the agreement being out of the question, a collateral demand arises; as in the case of stock-jobbing differences. (c) Here you cannot stir a step but through that illegal agreement; and it is impossible for the Court to enforce it. I must therefore dismiss the bill.

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Bill dismissed. (d)

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MORRIS v. STEPHENSON. (1)
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ROLLS. *July* 28*th*.

Husband, under the circumstances, decreed to procure his wife to join in a surrender of copyhold estate.

JOHN MORRIS, and *Jane*, his wife, seised of freehold and copyhold estates to the use of *Jane Morris*, for life, and after her decease to the use of *John Morris*, for life; with remainder to the use of such persons, and for such estates, &c. as they or the survivor should appoint, by indentures, dated the 18th of *June*, 1799, joined in revoking the uses, according to a power for that purpose, and in limiting and appointing the estate; and *John Morris*, for himself and his wife, (she thereby consenting thereto) covenanted, that he and his wife should within one month surrender the copyhold estates to the use of *Rowland Stephenson* and others, their heirs, &c.; upon trust to sell; and pay the debt of 3299*l.* 15*s.* due to them from *John Morris;* and to pay the residue according to the appointment of *John* and *Jane Morris*, or the survivor.

A sale having taken place, the first bill was filed on behalf of *Jane Morris* by her next friend, for the purpose of setting aside that sale, on the ground that the deed was obtained by fraud: but that case not being made out, that bill was dismissed.

The bill in the other cause prayed, that the defendants *Morris* and his wife may specifically perform the covenant; and surrender the copyhold estates, &c. The defendants, by their answer, attempted to set up the same ground of fraud, as in the original bill.

Mr. Richards, Mr. Romilly, and Mr. Thomson, for the Plaintiffs in the second cause.

The husband is bound by his covenant to procure his wife to [475]

(b) 1 *Bos. & Pul.* 3. *Farmer* v. *Russell*, 1 *Bos. & Pul.* 296.

(c) *Petrie* v. *Hannay*, 3 *Term Rep.* 418. As to the authority of that case, and *Faikney* v. *Reynous*, 4 *Bur.* 2069. See *Ex parte Mather, ante*, vol. iii. 373.

(d) *Hartwell* v. *Hartwell, ante*, vol. iv. 811.

{(1) See the remarks of Lord *Eldon* upon the doctrine of this case, 8 Ves. Jun. 514, *et seq.* See, also, 16 Ves. Jun. 367, and *Howell* v. *George*, 1 Madd. Rep. 6.}

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join in a surrender: *Hall* v. *Hardy*. (a) The reason is given in the note (b) to that case; and the concluding observation applies to what is not suggested in this case. In *Barrington* v. *Horn*, (c) and *Berry* v. *Wade*, (d) the latter certainly in a book of no great authority, decrees of the same kind were made. The last case is *Withers* v. *Pinchard*. (e) An agreement was entered into by a man, on behalf of himself and his wife, to sell the estate in question to the plaintiff. One moiety was the wife's. The estate was settled to certain uses, with a power of revocation in the husband and wife, with consent of the trustees. The wife, by her answer, as well as the husband, swore, that she never gave her consent to the sale; and they stated, that they believed the trustees would not consent to the revocation of the uses. The *Lord Chancellor* decreed a specific performance; and that the husband should convey, and should procure all proper parties to convey, as the Master should direct, if the parties should differ concerning the conveyance.

In that case, the wife must necessarily have executed the power of revocation; which would not do without the consent of the trustees. In this case, the husband has covenanted to surrender as far as he has an interest, and to procure her to surrender as far as she has an interest. The Court will not execute the agreement against the wife: but it is necessary to bring her before the Court.

The MASTER *of the* ROLLS. Has that doctrine ever been controverted, or shaken?

[476] *For the Plaintiffs.*—There is only one case that looks like an inclination of the Court to the contrary: *Otread* v. *Round*; (a) which is noticed by *Mr. Fonblanque*. (b) But in that case, the husband had actually offered to refund the money by his answer.

Mr. Piggott, and Mr. Stanley, for the Defendant, the Husband: Mr. Fonblanque, and Mr. Leach, for the Wife.

Independent of authority, the Court will not countenance this doctrine; which is not now the sense of *Westminster Hall*. *Hall* v. *Hardy* has not been followed. *Otread* v. *Round*, a later decision, is in opposition to it; and it is not put upon the circumstances: but the practice is reprobated. There is no case in favour of it, from 1733 till the decree in 1795. These plaintiffs, reciting the settlement, knew the extent of her power: how far she could make any alteration in the uses of the settlement. No consideration passed to the wife. They had lent money to the husband upon his personal security; none upon these estates. This is a case in which the covenantee ought to be left to law. In the case in 1733, the only purpose was to bar dower: and there is merely the general language of *the Master of the Rolls*. Unless bound by authority, so as to have no discretion left, the Court will not conceive this a case for a specific performance, according to the just and measured discretion of the Court. It

(a) 3 *P. Will.* 187. (b) 3 *P. Will.* 189.
(c) 5 *Vin.* 547. 2 *Eq. Ca. Ab.* 17. *Pl.* 7. (d) *Finch*, 180.
(e) In Chancery, at *Lincoln's Inn Hall*, July 7, 1795.
(a) p. 476. 4 *Vin.* 203. *Pl.* 4. (b) 1 *Treat. Eq.* 294.

would be in opposition to what the Court does every day as to the interest of a married woman. The presumption that the wife has consented, cannot prevail against the fact. Will the Court, under these circumstances, send the husband to jail till he can prevail upon his wife to join? A party may be bound to procure an Act of Parliament; or to do any thing which he may *be supposed to have in his power; but not to use his control over his wife, to compel her to part with her property; *per fas aut nefas* to obtain that which the law would not permit her to accede to without a private examination. If the plaintiffs contract with a person not *sui juris*, or whose contract cannot have effect but through the medium of a person not *sui juris*, they cannot complain. This Court will not give encouragement to that. The Court has uniformly said, a personal decree cannot be made against the wife: but this will be such a decree, in the most oppressive form. The principle of not making a decree against her is, that, if it is competent to her to contract, they ought to be assured that she does so without the influence of her husband. The policy of this Court ought to conform to the policy of the law, or at least ought not to counteract it. This decree will declare that it is the duty of the husband to use his influence; and then the Court will be bound to relieve the wife against the effect of that influence. The way to try whether the wife is a necessary party, is to inquire whether there could be a decree against her; and as it must be admitted there cannot, the bill must be dismissed, and with costs. [*477]

Mr. Richards, in Reply.—The wife is a party in all these cases; and has a right to be made a party; that she may state her reasons against the demand. There is nothing to prevent the exercise of proper influence. In the case in *Peere Williams*, there was an actual decree; and Sir *Joseph Jekyll* says, there have been a hundred precedents. Where is the difference upon the right to dower? That is as much her interest as if the estate had been originally her's. The exception in the note proves the general rule. There was nothing dissenting in *Mrs. Morris*. She executed the deed of revocation; and joined in her husband's applications to the plaintiffs, from time to time. It must be presumed she had no objection to the covenant. The husband, having undertaken with his eyes open to do the specific thing, must take the consequences. There is no suggestion, that now *Mrs. Morris* will not perform, if the Court makes the decree against her husband. There is no hardship upon her; for she has agreed now, as far as she can in point of conscience; and the motive is to get her husband out of difficulties. Why is a wife allowed to levy a fine? The Court cannot prevent her; and has no right to do any thing but to ask her, whether it is of her own accord; whether there is any coercion upon her; whether it is her act. If proper means are used by the husband, this is within all the policy of the law and of society. [478]

The MASTER *of the* ROLLS. The defendant, the husband, does not allege, that he is unable to procure his wife to join. He

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does not offer to pay the debt; and it is impossible for him to put the plaintiffs in the same situation, as if the deed was never executed; for they would in 1779 have had an execution against him, if he had not redeemed himself by giving this security. It is unnecessary therefore to discuss Lord *Cowper's* reasoning: this case being so extremely dissimilar to that; this differing in all its circumstances. The defendant there stated absolute inability to perform; and offered to put the other party in the same situation, as if the agreement had never taken place. Here the only objection he or she states to the performance is, that the agreement was obtained by fraud; not, that she is unwilling to enable him to perform it, merely, because it is incompetent to him to dispose of her estate; but because he and she were imposed upon in entering into the deed. The last case, in 1795, was infinitely stronger; for the wife never had expressed any assent.
[479] The first time she was consulted she expressed her disagreement. The contract was made without her knowledge: yet she was decreed to perform it; without regard to the possible consequences resulting; that to relieve him she might be under the necessity of disposing of her estate. But here the wife executed the deed; and even in the very covenant it is declared, that it is entered into by him with her consent. In such a case it is too much to say, there shall not be a specific performance. It would be to say, that, merely because he is a husband, he is to be exempted from performing his covenant; for *non constat*, that there is any difficulty in obtaining her consent. I should therefore be obliged to go the length of saying, that merely because he is married, he shall not be compelled to perform his covenant.

It is unnecessary to observe upon Lord *Cowper's* reasoning. But there are many other ways, in which a wife would be under compulsion; and yet it would be quite impossible to abstain from enforcing the demand against the husband. The effect would have been just the same, if she had originally refused. The creditor would have thrown her husband into a prison; and there would have been the same necessity upon her. If therefore there is any thing in that reasoning in the instance of a voluntary sale by the husband, it would not perhaps hold, where the object is to redeem himself from the demand of a creditor, having that power over him. But it is unnecessary to enter into that reasoning upon this occasion: this case being quite different from that before Lord *Cowper*.

As to dismissing the bill against the wife, I should wish to see the form, and to look at the decree in *Withers* v. *Pinchard*.

[480] Decree the defendant *John Morris* specifically to perform the covenant, and to procure his wife, &c. with liberty to retain the costs out of the purchase money. (a)

(a) *Emery* v. *Wase*, *ante*, vol. v. 846. The decree affirmed by the *Lord Chancellor* upon appeal, *post*. {vol. viii. p. 505.}

1802.

WEBB *v.* THE EARL OF SHAFTESBURY. [*481]

THE EARL OF SHAFTESBURY *v.* ARROWSMITH. *July 30th, 31st.*

The Court controls a trustee in the exercise of a power to appoint new trustees, though given in very large words. (1)

A trustee and executor, though taking under the will a commission as a satisfaction for his trouble, entitled to allowances under a general trust to set and manage, as he should think proper, and out of the rents and profits to pay all rates and taxes, charges of repairs, stewards', bailiffs', and game-keepers', salaries and expenses, and all other charges and expenses he should think proper. (2)

But he was not allowed to appoint an establishment, game-keepers, &c. except as the due management required. Inquiry therefore directed as to that; and whether the liberty of sporting, during the continuance of the trust, could be let for the benefit of the *Cestuy que trust:* if not, the game belongs to the heir.

Election between claims against a will and under it; though remote interests.

SIR JOHN WEBB, by his will, devised all his real estates in the county of *Gloucester*, to *Edward Arrowsmith*, his heirs and assigns; upon trust to set and manage, as he should think proper, and out of the rents and profits to pay all rates and taxes and the charges of repairs, and stewards', bailiffs', and game-keepers' salaries and expenses, and all other charges and expenses, which he and they should think proper, and the commission after-mentioned; and after these payments, upon trust, until his grand-daughter, Lady *Barbara Ashley*, should attain the age of twenty-one, or marry, to invest the surplus from time to time in real or government securities, and upon her attaining that age * or marrying to convey the estates and transfer the accumulations to his said grand-daughter; her heirs, executors, &c. with other remainders over.

The testator also gave all his real estates in the county of *Dorset* to *Arrowsmith*, in the same manner and with similar powers; directing an accumulation of the rents and profits during the lives of Lady *Barbara Ashley*, and her mother Lady *Shaftesbury*, and after the decease of the survivor to convey and transfer to the children of Lady *Barbara Ashley*, as therein mentioned.

He gave all the residue of his real estates to *Arrowsmith*, his heirs and assigns; upon trust to raise such sums of money for the payment of his debts, &c. as his personal estate should fall short of paying; and as to all his estates in the county of *York* he devised the same to *Arrowsmith*, his heirs and assigns; upon trust to let and set, &c. and deduct such commission, as before mentioned as to the *Gloucestershire* estates; and, until his natural son *James Webb* should attain the age of twenty-one, to pay such sums out of the rents and profits, as *Arrowsmith*, his heirs or assigns, should think proper for the maintenance and education of *James Webb*, and for his advancement and preferment in the world; and after twenty-one until twenty-five to pay him 1200*l.* a-year; and to invest the surplus rents from time to time in real or government securities; and upon his attaining twenty-five to transfer to him the accumulation; and in case of his death under that age to his children equally: if none, to the testator's other natural sons *John* and *Frederic Webb;* and, if they should die

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{(1) See *Haight et al.* v. *Day et al.* 1 Johns. Cha. 18.}

{(2) See the note to *Fountaine* v. *Pellet*, *ante*, vol. i. p. 337.}

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under twenty-five, to *John Frankland*, his executors, &c.; and on *James Webb's* attaining twenty-five, or at any other time his said trustee should think proper, he directed him to convey the said estates to *James Webb* for life, remainder to trustees to preserve contingent remainders; remainder to * his first and other sons, in tail made; with similar remainders to *John* and *Frederic Webb* and their first and other sons; remainder to *John Frankland* and his heirs; and he gave a power for raising a jointure for any wife of his son *James* and portions, as *Arrowsmith*, his heirs or assigns, should think proper.

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The testator then devised his *Lincolnshire* estate to *Arrowsmith* in the same manner, upon similar trusts for his second natural son *John Webb* and his first and other sons, and his estates in the counties of *Northampton*, *Durham*, *Wilts*, and *Middlesex*, and in *Westminster*, for *Frederic Webb* and his first and other sons; with remainders respectively to the other sons, and the ultimate remainder to *Frankland* and his heirs; with similar powers in *Arrowsmith*, and subject to commission to him, as the other estates. The testator then among other legacies and annuities gave an annuity of 100*l.* to *Frankland* for his life; and directed, that he should be continued agent and steward of his estates in the same manner and upon the same terms, salary and allowances, which he had done and received, for his life, or so long only as *Arrowsmith*, his heirs or assigns, should think proper; and in case *Frankland* should refuse or neglect to give every advice and assistance in his power to *Arrowsmith*, his heirs and assigns, in the execution of the trusts of the will, then he revoked all the devises and bequests to him. He also directed, that *Arrowsmith* should have and retain to himself and for his own use as a satisfaction for his trouble in the execution of the trusts of his will at the rate of 5 per cent. *per annum*, upon the amount of the gross annual rents and profits of his real estates, and also upon the amount of the interest and dividends to arise from the accumulations of such rents and profits, and from his personal es-
[483] tate; and he gave and bequeathed the said commission and allowance to *Arrowsmith*, and directed, that he should receive and be entitled to the same, until the several and respective persons, to whom he devised and bequeathed his real and personal estates, should become entitled thereto in possession, and that the same should be retained by or paid to him from time to time during his life. The will then proceeded thus:

"I do hereby authorize and empower the said *Edward Arrowsmith* at any time during his life by any deed or instrument "under his hand and seal to nominate and appoint one or more "person or persons to be a trustee or trustees for all or any part "of the purposes and trusts in this my will contained; and who "shall act in all things as fully and effectually as the said *Edward Arrowsmith;* and he and they shall upon the death of the "said *Edward Arrowsmith* be entitled to the same commission, "which I have given to him; and when such new trustee or "trustees shall be so nominated and appointed, as aforesaid, I "direct the said *Edward Arrowsmith* to convey, assure, assign,

"and transfer, all my real and personal estate into the names of "himself and such new trustee or trustees." 1802.

The testator then appointed *Arrowsmith* and the mother of his said children their guardians. He also directed, that each and every of the person and persons, to whom he had thereby made any gift, devise, or bequest, should accept the same in full satisfaction and discharge of all debts, claims, and demands, upon him or upon any part of his real or personal estate, or otherwise; and he revoked the gifts and bequests to such persons, who should not accept the same in satisfaction, and execute releases. He gave his daughter the Countess of *Shaftesbury* the sum of 2000*l.* to be paid within six months after his decease; and all the [484] residue of his personal estate he gave to *Arrowsmith*, upon trust to accumulate, until his son *James* should attain the age of twenty-five, and to be transferred to him at that age; in case of his death under that age without issue, to his son *John;* and in case of his death, &c. to *Frederic;* and in case of his death, &c. to *Frankland*, his executors, &c. He declared, that if his daughter or grand-daughter or any of their issue should institute any suit against his trustee, his heirs, executors, &c. or molest or disturb them in the execution of any of the trusts, he revoked the several devises and bequests to them; and gave the same to *Frankland;* and he appointed *Arrowsmith* sole executor.

The first bill was filed to have the will established: the second by the heir at law. The will was established by a decree, directing the accounts, and among other things, that *Arrowsmith* should let and set with the approbation of the Master. Exceptions were taken by *Arrowsmith* and *Frankland* for disallowing several claims set up by them, as follows:

Allowances to them for salaries, audit dinners to the tenants, travelling expenses, postage, and a variety of other charges.

168*l.* claimed by *Arrowsmith* as due from the testator at his death upon the balance of an unsettled account of money laid out by him for the testator.

81*l.* 11*s.* 7½*d.* claimed by him as an allowance for game-keepers' and stewards' wages upon the *Gloucestershire* estate, and for powder, shot, and dogs.

Frankland, who was a relation of the testator's, claimed as a creditor an annuity of 15*l.* charged upon part of the estates by [485] the will of Dame *Barbara Webb;* an annuity of 120*l.* secured by the bond of the testator; a mortgage by the testator in 1784, for 3500*l.*; an allowance for valuing and selling estates, &c.; 355*l.* as a certain salary enjoyed by him during the testator's life; rent of a house; an allowance for taxes; travelling charges, about 60*l.* a-year; and board and lodging, when attending the testator for settling his accounts. Some of these claims were objected to as unreasonable; and it was also insisted, that this was a case of election.

The causes came on upon the exceptions and for further directions; and upon a motion, that the defendant *Arrowsmith* may be restrained from executing a conveyance to a new trustee.

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The Attorney-General, Mr. Richards, and Mr. Stanley, for the Plaintiffs in the first cause.—Mr. Mansfield, and Mr. Cox, for the Plaintiffs in the second cause.

The object of the motion is to restrain the defendant from executing a conveyance delegating his whole authority. Upon general principles, no one acting in the character of trustee can remove himself from the control of the Court administering the affairs of the *Cestuy que trust.* The cases of Charities are applicable. It cannot be conceived that an executor, or trustee, can have an authority not in some degree under the control of the Court, and there are many instances of the most unlimited words. This can never be treated as a benefit to the trustee. A positive direction, that he should not be subject to the control of the Court, would not prevent it. The principle is to be found in the *Duke of Beaufort* v. *Berty*, (a) and many other cases. This [486] cause, instituted for the benefit of the *Cestuy que trusts*, being under the eye of the Court, the trustee must act under the direction of the Court. If therefore he wishes to assign his trust, he must submit a proper person to the Master in the usual course.

Mr. Romilly, for the Defendant Arrowsmith.—If the defendant has the power under the will to appoint a new trustee, though this Court has taken upon itself to superintend his conduct so far as to require him to pass his accounts before the Master, which is all the Court has done, nothing can be done by this motion. If he has not that power, he can do nothing. Every trustee has the power of passing the legal estate. The Court will hardly interpose from the mere apprehension of that. If this is to be under the authority of the Court, he will have no power; for without this power he might propose a trustee. The argument contends, that the Court will do this for him; which would be contrary to the will. The testator has said, he shall have these great powers during the time he acts himself; and that he shall nominate the trustees when he ceases to act; knowing the situation of the property; and thinking him the best person to execute this power. What authority has the Court to interpose? The only mischief can be, that the legal estate might be vested in some other person, whom the Court might order to convey to any one else.

Mr. Mansfield, in Reply.—A clause giving trustees a power to nominate others is not uncommon; but it never was supposed that, when once the estate was under the management of the Court, a trustee having such a power could *suâ sponte* appoint a new trustee. In that respect there is no difference between this trustee and any other. The argument must be, that he might sell this, or appoint the most distressed gambler. Is it of no conse- [487] quence to whom the legal estate is to go? The first effect would be a new suit: a supplemental bill; and additional expense.

The Lord CHANCELLOR. The defendant appears to me to have no interest whatsoever in the act of appointing a new trustee. If

(a) 1 *P. Will.* 702.

it stands upon this clause alone, he has no other discretion with regard to the appointment of a new trustee, than trustees in ordinary cases. It is true, he can, by the appointment of a trustee, convey a much more extensive interest than a trustee appointing a new one in general cases can. But that circumstance does not at all affect the control of the Court over his discretion; though it imposes upon the Court a duty more especially to take care that its own discretion is wisely exercised; for, when such a remuneration is given to the new trustee as *Mr. Arrowsmith* can give, no one motive ought to operate upon him in the appointment, but to do the very best thing, not for himself, or the person whom he is to appoint, but for those whose interests they are to take care of. There is no doubt, therefore, of the control of the Court over his discretion. It does not prevent the exercise of his discretion; but takes care that it shall be duly exercised. In the ordinary case, trustees, parties to the suit, will not be allowed to change the trustees without the authority of the Court. There is no doubt, the Court will restrain; and it is not a sufficient answer, that the Court will take care to prevent the consequences: for the mischief is in a great measure done by the appointment: the necessity of getting back the legal estate. It is enough to say, the Court does not permit the discretion to be exercised, except under the direction of the Court. The defendant must therefore, if he wants to appoint a new trustee, go before the Master, and propose a person; and therefore ought to be restrained from appointing a new trustee without an application to the Court.

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July 31st.

The Lord CHANCELLOR. In this case I feel a strong inclination to hold, that this commission of *5l.* per cent. was the whole *Arrowsmith* was to have: but the will does not say so; and upon the will I must give him the other allowances.

As to the power of appointing new trustees, I am very well satisfied, notwithstanding the strong words of this will, the Court has control over *Arrowsmith*. Nothing proves it more strongly than the authority given him by the decree to let and sett with the approbation of the Master.

I am of opinion he has no right to appoint bailiffs, gamekeepers, &c. except as the due management of the estate requires that. It is quite impossible for him, under this will, to keep up an establishment of pleasure; as a gamekeeper, &c. There must therefore be a reference as to the establishment; regard being had to the will. There must also be an inquiry, whether the liberty of sporting can be let for the benefit of the *Cestuy que trusts;* and if not, I think the game will belong to the heir. If it is necessary for the preservation of the game, that he should appoint a gamekeeper, I would not prevent him from appointing one; but for that purpose only; for he cannot under this will have an establishment of pleasure there.

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The decree must direct an election against *Frankland;* though clearly not intended by the testator with reference to these remote interests. Also, taking the whole will together, upon the particular expressions in this will, *Arrowsmith* cannot claim his debt and commission both. Therefore he must elect.

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BASTARD v. CLARKE.

August 2d.

No order under the Statute 7 *Geo.* II. c. 20, s. 2. the bill not being confined to a mere foreclosure; but including also another subject.

THE Bill was filed for a foreclosure; and also set up another demand against the defendant upon a distinct ground; praying a satisfaction in respect of that; and that the estate should be a security for both.

Mr. Mansfield, for the Defendant, moved for the usual reference to the Master, under the Statute. *(a)*

Mr. Romilly, for the Plaintiff, objected, that the order under this Act of Parliament can be made only upon a mere Bill of Foreclosure; never where there is any thing else in the cause; and if the other was a distinct subject, the defendant ought to have demurred, on the ground that the bill was multifarious.

The Lord CHANCELLOR said, he never knew an instance of this order, where there was any thing else in the bill beyond the foreclosure; observing, that it would not obtain the object of the Act; for the cause must go on as to the other matter.

Mr. Lloyd (being applied to by *the Lord Chancellor)* said, a similar application was refused in *Vaughan* v. *Lloyd: (b)* the mortgagee wanting to tack all his other demands to his mortgage.

Mr. Mansfield said, in that case the other matter was connected.

Mr. Romilly mentioned *Huson* v. *Hewson; (c)* where Lord

[490] *Rosslyn* was of opinion, though certainly Lord *Alvanley* was not, that the reference under the Statute was such an acquiescence, that the defendant should not afterwards, before the Master, insist that part of the money was paid.

The Lord CHANCELLOR said, the justice of the case seemed to be, that the reference should be made as to the mortgage; and the cause should go on as to the rest; but he never knew it done.

The order was not made.

(a) Stat. 7 *Geo.* II. c. 20. s. 2. *(b)* Cited, *ante*, vol. iv. 48. *(c) Ante*, vol. v. 105.

1802.

ROLLS.
February 4th.
August 3d.

CARY *v.* ABBOT.

Residuary bequest for the purpose of educating and bringing up poor children in the Roman Catholic faith, void.

The fund does not go to the next of kin; but is in the disposition of the crown to some other charitable use by sign manual.

GEORGE CARY, a Roman Catholic, by his will, after giving several legacies to his executors and others, and two annuities, and some other bequests, gave and bequeathed as follows:

"I also give and bequeath in trust to my executors hereinafter "named, and for the purpose hereinafter named, all the residue "of my personal estate not hereinbefore disposed of, whatsoever "nature, kind, or quality the same may be, also all interest arising "therefrom, I give for the purpose of educating and bringing up "poor children in the Roman Catholic faith, such as orphans or "those whose parents or friends were not able or willing so to "educate those children, to be chosen by my trustees hereinafter "named, or such trustees as they shall afterwards appoint or "cause to be appointed: nevertheless, I at all times allow a part "of this residue to pay such sum or sums as may be requisite for "the legal security or execution of this or any other part of this "my last will."

The bill was filed by the brother and sister and nieces of the testator, as next of kin, who were also legatees; claiming their legacies: and praying, that the bequest of the residue may be declared illegal and void; and that it may be declared, the testator died intestate as to the residue; and the plaintiffs, as next of kin, may be declared entitled thereto, &c. [491]

The *Attorney-General* was made a defendant.

Mr. Richards, and Mr. Trower, for the Plaintiffs.—The claim of the plaintiffs is upon the ground, that this residuary bequest is completely void. The *Attorney-General* insists, that, though it cannot be sustained in the form intended, yet, as a superstitious use, either this Court or the crown may appoint to some charity. That point will be rested upon the Statute of *Edward* VI. (a) It is stated in all the Abridgments, that, wherever there is a disposition for a superstitious use, it goes to the crown. That probably arose from a mistake of the law, arising from a passage in *Duke.* (b) The Statute appears plainly to have a retrospect to gifts made before; and has no provision applicable to those subsequent, as to forfeiture, though clearly void; and it cannot be maintained upon that Statute, that property given at this time to a superstitious use shall be forfeited. It is clear from the Statute, that this is not a charitable, but a superstitious, use: but all the expressions are retrospective merely. *The Attorney-General* v. *Guise*, (c) and the case there cited, are certainly against the plaintiffs. *Gates* and *Jones's* case is not to be found: but it will probably turn out to have been before the Statute; and all the cases of forfeiture to the crown will also be found to have been previous to it. By what authority can the crown claim, if not

(a) Stat. 1 *Edw.* VI. c. 14. (b) *Duke's* Char. Use, 105.
(c) 2 *Vern.* 266.

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by the Act? As *Parens Patriæ*, the right of the crown is to execute charitable uses. Only the seventh section of the Act relates to money. What could be the use of that section, if this right existed in the king as *Parens Patriæ* or by the prerogative? Upon that hypothesis also, it would have extended to all future dispositions. The claim, therefore, rests solely upon the subsequent cases, and *Dicta*, founded upon mistake, and a defective construction of the Statute, and the passage in *Duke*. If so, the common equity for the heir or next of kin must prevail. In a very recent case, *De Garcin* v. *Lawson*, (a) not yet decided, *The Attorney-General* v. *Baxter*, (b) and *The King* v. *Lady Portington*, (c) were questioned; and Lord *Thurlow's* opinion, in *Moggridge* v. *Thackwell*, (d) is strong against the first decision of the former. To educate these children in the Protestant faith would be directly against the intention.

Mr. Mitford, for the Attorney-General.—The right of the crown is established by a great number of decisions; many of which are upon subjects that arose long since the Act. Superstitious uses are void, not only by the Statute, but by the general policy of the law. *The King* v. *Lady Portington* received great discussion. The principle, as laid down in *De Costa* v. *De Pas*, (e) has been always distinctly looked up to. The distinction is there taken, that, when the devise is to a superstitious use, and made void by Statute, or to a charity, and made void by Statute of Mortmain, then it should belong to the heir at law or
[493] next of kin: but where it is in itself a charity, but the mode in which it is disposed of is such that by the law of *England* it cannot take effect, as promoting a religion contrary to the established one, then the crown, by sign manual directed to the *Attorney-General*, may give orders in what charitable manner it shall be disposed. The disposition made under that decision was certainly a complete departure from the intention of the testator.

Mr. Richards, in Reply.—It is not disputed, that this is a superstitious use, as much as any of the uses specified in the Statute, which has the expression, "other like thing." There is a plain intention here to make proselytes, which is the characteristic of this religion. If a gift to a Roman Catholic priest is void, a gift for the purpose of educating children in the faith he teaches must be void also. (a) That it is void by the Statute, appears clearly through the whole of it. The object cannot take place; and the forfeiture arises by way of penalty for the attempt; and it is so considered in *Duke* and all the cases. It is equally clear, that the Statute is retrospective throughout; and it has been always so considered; as it was in *Moggridge* v. *Thackwell*;

(a) *Ante*, vol. iv. 433, note.

(b) 1 *Vern.* 248. The decree reversed in *The Attorney-General* v. *Hughes*, 2 *Vern.* 105.

(c) 1 *Salk.* 162.

(d) *Ante*, 36. vol. i. 464. 3 *Bro. C. C.* 517.

(e) *Amb.* 228. See that case, as corrected by the *Lord Chancellor* from Lord *Hardwicke's* notes, *ante*, 76, in *Moggridge* v. *Thackwell*.

(a) p. 493. *Smart* v. *Prujean*, *ante*, vol. vi. 560.

though incidentally only; the use in that will not being superstitious. *The Attorney-General* v. *The Bishop of Oxford*, (b) and *Corbyn* v. *French*, (c) were decided in favour of the next of kin, upon the principle, that, if the particular object pointed out could not be attained, no other object should take place. In the case of *Downing College*, (d) Lord Chief Justice *Wilmot* was of opinion, that it should go to another charity. But Lord *Thurlow* dissented from that; and after Lord *Kenyon's* decree in *The Attorney-General* v. *The Bishop of Oxford* acted upon it. The consequence is like that of the Statute of Mortmain; (a) making the disposition absolutely void; and being so, the Court cannot give it effect or energy. In that way Lord *Hardwicke* understood it in *De Costa* v. *De Pas*. [494]

Mr. Romilly (*Amicus Curiæ*) mentioned *Isaac* v. *Gompertz*; (1) in which Lord *Thurlow* held a purpose to educate Jews a good charity.

August 3d.

The MASTER *of the* ROLLS. This bill, filed by the next of kin of the testator, some of whom are legatees under the will, among other things, prays, that the bequest of the residue for the purpose of educating children in the Roman Catholic faith, may be declared illegal and void; that it may be declared, the testator died intestate as to the residue; and that the plaintiffs, as next of kin, are entitled thereto. The *Attorney-General*, who is made a defendant, insists, that the residue ought to be applied to such charitable purposes as His Majesty shall please to direct. That the residue cannot be applied according to the will, is certain. The Roman Catholic religion has received a considerable degree of toleration, by the Statute of the present king: (b) yet there is a provision in that Act, that all dispositions before considered unlawful shall continue to be and be deemed so. There is no doubt, a disposition for the purpose of bringing up and educating children in the Roman Catholic religion was unlawful before that time. The consequence of its being void, if authority was out of the question, would be an intestacy; that the gift being so void, must be considered as no gift. But that is contradicted by authorities without number. According to them, whenever a testator is disposed to be charitable in his own way and upon his own principles, we are not to content ourselves with disappointing his intention, if disapproved by us: but we are to make him charitable in our way and upon our principles. If once we discover in [495]

(b) Stated *ante*, vol. iv. 431, from the Register's Book.

(c) *Ante*, vol. iv. 418.

(d) *The Attorney-General* v. *Downing*, *Wilm.* 1 *Amb.* 550, 571. *The Attorney-General* v. *Bowyer*, *ante*, vol. iii. 714; vol. v. 300. *The Attorney-General* v. *Vigor*, *post*.

(a) p. 494. Stat. 9 Geo. II. c. 36.

(b) Stat. 31 Geo. III. c. 32.

{(1) 1 Ves. Jun. 44.}

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him any charitable intention, that is supposed to be so liberal as to take in objects, not only not within his intention, but wholly adverse to it. It is not for me to attempt to overturn the settled law and practice; according to which, charitable bequests void as to one object may be appropriated to another.

But in this case, can I, founding myself upon the expression of Lord *Hardwicke* in *De Costa* v. *De Pas*, (a) say, that it is so wholly void as not to be applicable to any other purpose? According to that statement, to entitle the heir or next of kin, it is requisite, not only that the devise is to a superstitious use, but to such as is made void by Statute. There is no Statute making superstitious uses void generally. The Statute of *Edward* VI. relates only to superstitious uses of a particular description, then existing. The Statute of *Henry* VIII. (b) relates only to assurances of land to churches and chapels; which, if for a longer term than twenty years, it declares absolutely void. The Statute of *George* I. (c) was only temporary. In *The King* v. *Lady Portington*, one of the resolutions is, that the use, being superstitious, is merely void; and for that reason, the *King* cannot have it: yet, however, it is not so far void as that it shall result to the [496] heir; and therefore the *King* shall order it to be applied to a proper use. In *The Attorney-General* v. *Guise*, the case of *Gates* and *Jones* is mentioned: in which it is said, a charity given to maintain Popish priests was applied to other uses by the *King*, and not to turn to the benefit of the heir. It is unnecessary for me to mention the other well known cases; in which bequests void as to the particular objects, but being charitable in their nature, have been applied to other charitable purposes. In the note to *Corbyn* v. *French*, of the argument in *De Garcin* v. *Lawson*, it is said by the counsel for the next of kin, that "the opinion, that "prevailed in some cases, particularly *Baxter's* case, that the "crown may appoint, was disapproved by Lord *Thurlow*, in "*Moggridge* v. *Thackwell*; and in *The Attorney-General* v. "*Whorwood*, the next of kin, upon the foundation of Lord *Hard*-"*wicke's* opinion, filed a supplemental bill; upon which Lord "Keeper *Henley* declared, that the disposition of the personal "estate, after the death of *Mrs. Scott*, so far as it was intended "for a charitable purpose, was void; and that it would belong to "the next of kin; and under that decree, the next of kin, upon "the death of *Mrs. Scott*, about eight years ago, obtained a trans-"fer of all the funds."

The Statute 1 *Edw.* VI. c. 14, relates only to superstitious uses of a particular description then existing.

Upon looking at *The Attorney-General* v. *Whorwood*, (a) it appears the doubt was, whether it was a bequest for a charitable purpose, or not; whether any charity was in the intention; for the argument upon the other side is, that this was no devise to a charity. Lord *Hardwicke* says, "If this trust is no charity, there "is no ground for the information in the name of the *Attorney*-

(a) See that case, as corrected by the *Lord Chancellor* from Lord *Hardwicke's* notes, *ante*, 76, in *Moggridge* v. *Thackwell*.

(b) Stat. 23 *Hen.* VIII. c. 10.

(c) Stat. 1 *Geo.* I. c. 55.

(a) p. 496. 1 *Ves.* 534.

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"*General* at the relation of the college on a devise to the college "only; for such information can only be supported on the foot of "a charitable use. On a * general devise to the college without "more, the college being a body capable of taking, must sue: the "*Attorney-General* having nothing to do with it; and it is only "before me upon that information." [* 497]

I do not therefore see how that case can be an authority, that an illegal but charitable use shall go to the heir or next of kin. Here the use is clearly charitable in its nature: *viz.* for poor orphan children. What vitiates it is, that they are to be educated in the Roman Catholic religion.

I must declare the bequest of the residue void; but that it must go to such use as the *King* shall direct. The *Attorney-General*, therefore, will apply for a sign manual.

SPERLING *v.* TREVOR. (1)

August 5th.

Exception to a report in favour of a title, on the ground, that the reversion in fee might have been disposed of, so as not to have descended to the heir, from whom the title was derived, overruled.

THE bill was filed to obtain specific performance of an agreement by the defendant for the purchase of a freehold estate from the plaintiff. The usual reference to the Master having been directed, the report was in favour of the title; to which report the defendant took an exception, as to part of the estate, called *The Bower Farm.*

The ground of the objection to the title was, that *Elizabeth Baker* ought to join in a recovery; the title being derived from *John Paine;* who, by indenture, dated the 19th of *January*, 1693, limited the estate to the use of himself for life; remainder, subject to a term, to his first and other sons by his then wife in tail male, remainder to his first and other sons by any other woman in tail general; remainder to his daughters in tail; remainder to *John Paine* in fee.

John Paine, and *Blanch*, his wife, had one daughter, *Elizabeth*, who married *John Smith*. *John Paine*, by his will, gave all such worldly estate, wherewith it pleased God to bless him, to his second wife, whom he appointed his executrix: but the will was attested by two witnesses only. He died without any other issue. *Elizabeth Smith*, upon the death of her father, entered into possession as tenant in tail; and levied a fine. She had issue *John Smith*, who married, but died without issue, and *Elizabeth*, who married *William Baker*. They had issue one daughter, *Elizabeth Baker*. From her the estate was purchased under a decree; and by mesne purchases became vested in the plaintiff. [498]

The defendant suggested, that the ultimate remainder in fee may have been, by deed, or will, disposed of by *John Paine*, or by any other person to whom it may have descended; and if the same should have been so disposed of, it could now be barred only by *Elizabeth Baker*.

{(1) See *Sugden, Vend. & Purch.* 254. (*2d. Am. Ed.*)}

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In support of the title, it was urged, that the bare possibility that *Paine* might have disposed of the reversion from his only child and heiress *Elizabeth*, would not be permitted by a Court of equity to impede the sale; and as it appeared that the estate was not devised, it was to be assumed, that the ultimate reversion descended to his only child and heiress at law.

Mr. Mansfield, and Mr. Steele, in support of the Exception.— Mr. Romilly, and Mr. Fonblanque, for the Report.

The Lord CHANCELLOR held a recovery not necessary.

The exception was overruled; and a specific performance decreed.

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ROLLS. *August 3d, 5th.*

HOLMES *v.* COGHILL.

Distinction between a power and absolute property. A power, unless executed, not assets for debts.

Power executed by will, but afterwards discharged; and a new power created. A subsequent codicil will not by the mere effect of republishing the will be an execution of the power.

Though the rule is settled, perhaps with some violation of principle, but with no practical inconvenience, that equity will aid a defective execution of a power, the want of execution cannot be supplied. (1)

BY the settlement previous to the marriage of Sir *John Coghill*, Bart. dated the 15th and 16th of *October*, 1754, estates in *Ireland*, in fee simple, in the counties of *Kilkenny* and *Cavan*, and leaseholds for lives in the county of *Kildare*, were settled to the use of Sir *John Coghill* for life; with remainder, subject to an annuity by way of jointure and a term for raising portions for younger children, to the first and other sons of the marriage in tail male; and it was declared, that Sir *John Coghill* should have full power by any deed or writing to be by him subscribed, sealed, and executed, in the presence of three or more credible witnesses, or by his last will and testament, by him signed, published, and declared, in the presence of the like number of witnesses, to charge the said premises in the counties of *Kilkenny*, *Cavan*, and *Kildare*, with any sum, not exceeding 2000*l.* for such uses and purposes as he should think proper, but without prejudice to the aforesaid jointure and portions.

Sir *John Coghill* was also entitled, under a will, to estates in the counties of *Meath* and *Dublin*; with remainder in tail to his eldest son; who attained the age of twenty-one in 1787. Soon afterwards they joined in suffering recoveries of all the estates, except the leaseholds; and by indentures of settlement, dated the 29th and 30th of *June*, 1787, they conveyed to trustees and their heirs the estates in the counties of *Kilkenny*, *Meath*, and *Dublin*, and the leaseholds in the county of *Kildare*, subject to the jointure and provision for younger children, but freed and for ever discharged of and from all right and power by the said settlement reserved to Sir *John Coghill* by deed or will to charge and [* 500] * encumber the premises in the counties of *Kilkenny* and *Kildare* with any sum, not exceeding 2000*l.* for such uses and purposes as he should think proper.

This conveyance was declared to be in trust for securing an

{(1) See *Roberts's Widow et al.* v. *Stanton*, 2 Munf. 129.}

annuity to the son, and then to trustees for a term of 200 years; and subject thereto, to the joint appointment of the father and son; and, in the meantime and until default of appointment, to Sir *John Coghill* for life; and then to the survivor of him and his son. The trust of the term of 200 years was declared to be for securing the annuity to the son; and then, that the trustees should at the request and desire of Sir *John Coghill*, to be signified, and to be by him signed, by demise, sale, and mortgage, of the premises in the counties of *Meath* and *Dublin*, comprised in the term, or of a competent part thereof, or by such other ways and means as they or the survivor, &c. shall think fit, raise and levy such sum or sums of money as Sir *John Coghill* should direct and appoint, not exceeding in the whole 2,000*l.*; and pay the same to Sir *John Coghill* or his assigns in his life-time to or for his and their own use for ever; or if the same or any part thereof shall not be levied, raised, and paid over, to him and his assigns in his life-time, then upon trust by all or any of the ways and means aforesaid to raise and levy the same at such time and times, and to pay over the same to such person or persons, as Sir *John Coghill* should by deed or by his last will by him duly executed and attested by two or more credible witnesses, direct and appoint; and then upon further trust to indemnify the aforesaid lands in the county of *Cavan* from all charges affecting the same; and then upon further trust to raise a further sum in addition to the portions under the settlement.

Sir *John Coghill*, by his will, dated the 9th of *September*, 1775, and several codicils, executed and attested so as to pass real estate, gave the sum of 2000*l.* to be raised under his power, and all the rest and residue of his personal estate, goods, and effects, (except his furniture at *Coghill Hall*, which he directed to be appraised, and delivered at the appraised value to his son,) and the amount of such appraisement, with the above fund to be applied towards payment of his debts; and he appointed his wife and two other persons executrix and executors. He died in *March*, 1790. One of the codicils was subsequent to the deed of 1787: but it took no notice of the power; and was for a distinct purpose, wholly unconnected with it. [501]

The bill was filed by simple contract creditors against the widow, who alone proved the will, and against Sir *John Thomas Coghill*, the eldest son and heir at law of the testator; praying an account and payment of their debts, an account of the personal estate; and that if any part of the personal estate has been applied in payment of specialty debts, for so much the simple contract creditors may stand in the place of the specialty creditors upon the real estates, of which the testator was seised, or in which he had such an interest as may be affected with specialty debts; and receive satisfaction thereout.

The defendants stated by their answers the accounts, from which it appeared, that the personal estate, and the real estate descended, were insufficient for the specialty debts. The general question therefore was, whether the plaintiffs could avail themselves of the fund, which was the subject of the power; consider-

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ed either as the absolute property of Sir *John Coghill;* or the power * being executed by the codicil, as republishing the will; or the want of execution to be supplied in equity.

Mr. Romilly, and Mr. Hall, for the Plaintiffs.—This power must be considered as executed by the effect of the codicil, republishing the will. Where a codicil takes notice of the will, it is clearly a republication. *Carte* v. *Carte.* (a) *Heylin* v. *Heylin.* (b) The effect of this codicil is to make the whole speak at that date; and therefore it is a republication. But if this case cannot be so considered, without any disposition, the fund, which is the subject of the power, will go as the absolute property of the party. Under similar circumstances the money has been raised for creditors; though there was no execution of the power; and in other instances against the express appointment. *Lassells* v. *Lord Cornwallis.* (c) In *Maskelyne* v. *Maskelyne* (d) there was no execution of the power. In *Robinson* v. *Dusgale* (e) it was raised for an administrator: a general power to appoint giving the absolute property; and an execution not being necessary. In *Goodtitle* v. *Otway* (f) it was held, that a power to dispose of, generally, gave the absolute property, and not in nature of a power. In *Tomlinson* v. *Dighton* (g) the distinction is taken by Lord Chief Justice *Parker* between a general power, giving the absolute property, and a limited power confined to particular objects. In *Maddison* v. *Andrew* (h) the subject of a power was considered the absolute property. In *Park* v. *Bathurst*, (i) and *Troughton* v. *Troughton*, (a) there had been an appointment: but Lord *Hardwicke's* opinion was, that though there had been no appointment, and nothing done, it would be assets for debts. In *Bainton* v. *Ward*, (b) Lord *Hardwicke*, according to the report in *Atkyns*, states, that "where there is a ge-

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(a) *Amb.* 28 3 *Atk.* 174. (b) *Cowp.* 130. *Pigott* v. *Waller, ante,* 98.
(c) 2 *Vern* 465 *Pr. Ch* 252. (d) *Amb.* 750.
(e) 2 *Vern* 181. (f) 2 *Wils* 6.
(g) 1 *P Will.* 149. *Salk.* 239. 10 *Mod.* 31. *Com* 194. 2. *Eq. Ca. Ab* 309 *Pl* 13. (h) 1 *Ves.* 57. (i) 3 *Atk* 269.
(a) p 503. 3 *Atk.* 656 1 *Ves* 86.
(b) 2 *Atk.* 172. That case appears to be stated more correctly 2 *Ves.* 2. The following abstract is taken from the Register's Book

Power to *George Ward* by deed or will to charge the premises with any sum not exceeding 2000*l*

George Ward, having made his will, dated the 25th of *April*, 1726, and thereby taking notice of the said deed and power, devised to his mother, the said *Phœbe Ward*, 500*l*; to the said defendants *Lætitia* and *Anne* 1000*l*.; and the remaining 500*l* to his wife *Isabella;* and made her sole executrix; and charged the premises with the said 2000*l*. legacies; and died without issue, indebted to the plaintiffs and others.

The decree declared, that the sum of 2000*l*. with the interest thereof, which the said *George Ward* had power to appoint by virtue of the said deed of the 12th of *February*, 1725, and of which he made an appointment by his will, is to be considered as part of his personal estate, liable to the satisfaction of the residue of his said debts. *Reg. Lib. A* 1740. Fol. 613.

A case, frequently referred to upon this subject, under the title of *Shirley* v. *Lord Ferrers*, before Lord *Talbot*, is probably *Lord Ferrers* v. *Lady Ferrers*, *Reg. Lib. A.* 1733. Fol. 285; the date of which, 7th *December*, 1733, corresponds with the case in the beginning of *Forester*. That decree however does not appear to include a decision of this point.

"neral power given or reserved to a person for such uses, intents "and purposes, as he shall appoint, this makes it his absolute es- "tate; and gives him such a dominion over it as will subject it "to his debts." 1802. HOLMES v. COGHILL.

* *Mr. Alexander, and Mr. Fonblanque, for the Defendants.*—This is, not the absolute property of the party, but a power to be executed in a particular manner. According to the statement in the great case of *Lord Townshend* v. *Windham*, (a) there was an appointment of the whole in *Bainton* v. *Ward*, and Lord *Hardwicke*'s opinion is expressed in *Lord Townshend* v. *Windham*, that it will not do without executing the power. In *Tollet* v. *Tollet*, (b) the distinction is taken between a defective execution and a non-execution of a power: this court in the particular cases aiding the former, but not the latter. All the cases cited fall within the distinction, there having been an execution in all of them. The rule may be harsh in not going this length in favour of creditors; but it must prevail. In this case there is total absence of intention to execute. In many instances, the date of the will is brought down to that of the codicil: (c) but this codicil is quite distinct, and does not look to the power. This is not like *Tomlinson* v. *Dighton*, in which the question was, whether the effect was not to enlarge the estate. [*504]

Mr. Romilly, in Reply.—It is very difficult to find a reason for the distinction between the defective execution and the non-execution of a power, as is observed in *Tassells* v. *Lord Cornwallis*. The case that approaches nearest to this, is *Lord Townshend* v *Windham*: but it turned entirely upon the particular circumstances. As to the point of republication, the objection is, that the thing, to which the will applied, did not exist at the date of the codicil: but the effect of this codicil, annexed to the will, duly executed, is to make the whole speak at that date. It is therefore a republication of the will, and an execution of the power. [505]

The MASTER *of the* ROLLS. The question in this cause is, whether the sum of 2000*l.* which Sir *John Coghill* had power to raise, should be considered assets for his debts. The creditors contend, first, that he has executed the power. If he has, there is an end of the question. If he has not, secondly, they insist, that this sum is substantially his property; as he had an absolute power to appoint it. *August 5th*

As to the first point, it is clear, the only power in existence at his death was that created by the deed of 1787. The power reserved by the marriage settlement was discharged for valuable consideration. That power he had executed by his will. But the power itself being gone before his death, the will had nothing to operate upon; unless it can be applied to the new power created for appointing the same sum, to be raised out of different es-

(a) 2 Ves. 1. (b) 1 P. Will. 489
(c) *Pigott* v. *Waller*, ante, 98.

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tates. It is admitted, he has not directly executed the new power. But it is said, that subsequent to the creation of it he executed a codicil, that has the effect of republishing the will, and making it speak as at the time of the republication. Be it so. It speaks only of the power given by the marriage settlement; which was as much gone as if it never had existed. There is no way, in which the will can be made to speak of the new power, for a new consideration, affecting different estates. I am clearly of opinion, there is no execution of this power.

[506] Upon the second point, there is an evident difference between a power and an absolute right of property: not so much with regard to the party possessing the power, as to the party to be affected by the execution of it. If our attention is to be confined to the former entirely, there is no reason why the money he has a right to raise should not be considered his property, as much as a debt he has a right to recover. But the latter can only be charged in the manner and to the extent specified at the creation of the power. The compact is not to raise 2000*l.* absolutely, and in all events, but, that it may be raised in a certain manner; *viz.* according to his appointment by deed or will, to be duly executed, and attested by two or more witnesses. To say, that without a deed or will this sum shall be raised, is to subject the owner of the estate to a charge, in a case in which he never consented to bear it. The chance, that it may never be executed, or, that it may not be executed in the manner prescribed, is an advantage he secures to himself by the agreement; and which no one has a right to take from him. In this respect, there is no difference between a non-execution and a defective execution of a power. By the compact, the estate ought not to be charged in either case. It is difficult, therefore, to discover a sound principle for the authority this Court assumes for aiding a defective execution in certain cases. If the intention of the party possessing the power is to be regarded, and not the interest of the party to be affected by the execution, that intention ought to be executed, wherever it is manifested; for the owner of the estate has nothing to do with the purpose. To him it is indifferent, whether it is to be exercised for a creditor, or a volunteer. But if the interest of the party to be affected by the execution is to be regarded, why in any case exercise the power, except in the form and manner prescribed? He is an absolute stranger to the equity between the possessor of the power, and the party in whose favour it is intended to be executed. As against the debtor, it is right that he

[507] should pay. But what equity is there for the creditor to have the money raised out of the estate of a third person, in a case in which it was never agreed that it should be raised? The owner is not heard to say, it will be a grievous burthen, and of no merit or utility. He is told, the case provided for exists: it is formally right: he has nothing to do with the purpose. But upon a defect, which this Court is called upon to supply, he is not permitted to [illegible] argument; and to say, it is not formally right: the case provided for does not exist; and he has nothing to do with the purpose. In the sort of equity upon this subject there

is some want of equality. But the rule is perfectly settled; and, though perhaps with some violation of principle, with no practical inconvenience. But further than supplying a defect in the execution, the Court has never gone. In *Lassells* v. *Lord Cornwallis*, the *Lord Keeper* says, (*a*) that "the Court has not gone "so far as, where a man has a power to raise money, if he neglect to execute that power, to do it for him; although he "thought it might be reasonable enough, and agreeable to equity "in favour of creditors."

At the opening I was strongly impressed with an idea, that there was no authority for the proposition contended for by the creditors. None was adduced, except some generality of expression in *Atkyns's* statement of the judgment in *Bainton* v. *Ward*. There is no such general proposition necessary to the decision of that case; for the whole sum was appointed; in which particular the statement is more correct, as introduced (*b*) in the report of *Lord Townshend* v. *Windham*; and there Lord *Hardwicke* lays it down expressly, that without an appointment no person could be entitled to the money; though the power was as large as in this instance. It was argued, that because the Court [508] will for creditors lay hold of the money, when it is appointed for a volunteer, the Court ought to lay hold of it for them, though there is no appointment; for in the former case, the application is against his intention. But in the given case, the money is already raised by a due execution of the power; and the Court only directs the application. It does not follow, that by its own act it shall charge the estate, when the power is not executed, nor attempted to be executed. Many of the cases cited determine only that a limited gift to a man, with a power to dispose of the thing given, will carry the ownership. But there is no doubt, this is a power in the proper sense of the word; and the power not having been executed, I am of opinion the money cannot be raised.

(*a*) 2 *Vern*. 465. (*b*) 2 *Ves*. 2.

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August 6th.

Parol evidence admissible to rebut a presumption; without regard to the nature of it; as, whether a mere casual conversation with a stranger, or between the parties, and upon the subject; or whether at the time of the transaction, previous or subsequent. But those circumstances are very material with reference to the weight and efficacy of it. (1)

Presumed satisfaction of a legacy by a portion: the evidence not being sufficient to rebut the presumption. (2)

JOHN BAYNE, by his will, dated at *Calcutta*, the 11th of *January*, 1790, gave, devised, and bequeathed, to *Alexander*

[(1) See *Mann* v. *Mann's Ex*. 1 Johns Cha. Rep 231. S. C. 14 Johns Rep 1. *Shelton's Ex*. v. *Shelton*, 1 Wash. Rep. 53. *Smith* v. *Fenner*, 1 Gallison's Rep. 170. *Jackson* v. *Kniffen*, 2 Johns. Rep. 31.]

[(2) See the notes to *Richardson* v. *Elphinstone*, *ante*, vol. ii. 463, and *Hinchliffe* v. *Hinchliffe*, *ante*, vol. iii. 516.]

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Bayne, and four other persons, all his estate, real and personal, that he should die possessed of or entitled unto, subject to the following trusts, and payment of all his just debts, and the legacies in that his will mentioned; out of which estate he gave, devised, and bequeathed, the sum of 5000*l.* upon trust for his natural daughter *Jean Read:* the interest whereof to be paid yearly to the said *Jean Read*, as long as the said *Jean Read* shall continue sole, on her own receipt or order in writing; and he directed, that upon the marriage of the said *Jean*, or if she shall be married at the time of his decease, his said trustees do pay to the said *Jean Read*, the said sum of 5000*l.* for her own sole use and benefit for ever, on her own receipt for the same, notwithstanding her coverture; and he did thereby charge his said estate with the payment of the said interest and sum of 5000*l.* as aforesaid.

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The testator then, after giving several other legacies and annuities, charged in the same manner upon his said estate, declared his will, that in case his said natural daughter, the said *Jean Read*, should die unmarried, the said sum of 5000*l.* so bequeathed as aforesaid, shall revert to his said estate, as also the annuity, granted to his sister *Cecilia*, on the death of his said sister; and that, after the payment of all and every the respective legacies so bequeathed and particularly expressed, as aforesaid, he gave, devised, and bequeathed, the rest and residue of his fortune and estate, both real and personal, to be equally divided between his nephew and three nieces.

The testator, after making his will, came to *England;* and purchased and contracted to purchase freehold estates. By indentures, dated the 3d of *December*, 1794, reciting the intended marriage of *William Kirby Trimmer* and *Jane Read*, the testator's natural daughter, and that the testator agreed to advance to *Trimmer* 2000*l.* immediately on the marriage, in part of the portion of *Jane Read*, and also to secure by his bond the further sum of 5000*l.* to *Trimmer*, to be paid him within twelve months after the decease of *Bayne*, with interest from the day of his death, to be applied upon the trusts in the said indenture mentioned; and that *Trimmer* agreed to secure by his bond the payment of 5000*l.* within twelve months after his decease, with interest from his death, upon the trusts therein also mentioned, and that bonds

[510] were executed accordingly, it was witnessed, that the said bonds were in trust in the first place, in case the marriage should take effect, that the trustees should receive the said sums of 5000*l.* and 5000*l.* when respectively payable, and invest the same in government or real securities, and stand possessed of such funds upon the following trusts: in case the 5000*l.* secured by the bond of *John Bayne* should become payable during the joint lives of *William Kirby Trimmer* and *Jane* his wife, then that the trustees should pay to or authorize the said *Jane Bayne* or her assigns, to receive the interest, dividends, &c. during her life, for such intents and purposes as she should, from time to time, notwithstanding her coverture, direct or appoint, by any writing under her hand; and in default thereof, to pay the same into the proper

hands of the said *Jane Bayne*, for her own sole use; and that her receipt should be a sufficient discharge for the same; and not to be subject to the debts, control, &c. of her said intended husband; and after her decease, upon trust from time to time to pay to or empower *William Kirby Trimmer* and his assigns to receive the interest, &c. during his natural life, for his and their own use; and as to the sum of 5000*l.* secured by the bond of *Trimmer*, in case *Jane Bayne* should survive him, upon a similar trust for her benefit; and after the decease of the survivor of them, to assign and transfer the capital of the said sums of 5000*l.* and 5000*l.* or the securities, to and between all and every or any child or children of the marriage, in such shares and proportions, and at such ages or times, and subject to such conditions, &c. as therein mentioned; and in case there should not be any child, or all should die before the age of twenty-one or the marriage of daughters, to assign, &c. the sum secured by the bond of *Trimmer* according to his appointment, in default thereof to his executors, &c.; and the sum secured by the bond of *John Bayne*, according to his appointment, &c. in the same manner; and *John Bayne* covenanted for payment of the sum of 2000*l.* to *Trimmer* immediately upon the marriage. [511]

The marriage took place; and the testator paid *Trimmer* 500*l.* in part of the 2000*l.*: but the remainder of that sum, and the 5000*l.* upon the bond of the testator, continued due, the former to *Trimmer*, the latter to the trustees, at the death of the testator.

Upon the bill of *Mr.* and *Mrs. Trimmer*, on behalf of themselves and all other the specialty creditors and legatees of the testator, the accounts were taken and the real estates sold. The Master's report stated the instruments and circumstances above mentioned, and the result of the accounts and produce of the sales, and the contracts entered into by the testator for the purchase of freehold and leasehold estates, after the date of his will.

The cause coming on for further directions, the question was, whether the legacy of 5000*l.* to *Mrs. Trimmer* was adeemed by the portion provided by the testator upon her marriage.

The plaintiffs went into parol evidence, to rebut the presumption: the material part consisting of the depositions of a *Mrs. Brown*; stating conversations with the testator in the month of *August* preceding the date of the settlement; the effect of which was, that the witness being informed by him of the intended marriage of his daughter, asked him, what fortune he intended to give her. He told her 5000*l.* and being pressed to give more, said, "She is in my will;" intimating, when pressed to give the whole immediately, that he was worth but 10,000*l.*

Mr. Alexander, *Mr. Romilly*, *and Mr. Harvey*, *for the Plaintiffs.*—The presumption of intention to satisfy a legacy by the advancement of a portion, is now a positive rule laid down by the Court to govern them as to the acts of the party. It is equally clear, that evidence must be admitted to show that the testator did not intend to satisfy the legacy by the portion. The [illegible] case in which this subject was very fully considered, is *Ellison* v. *Cook-* [512]

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son. (*a*) Lord *Thurlow* thought, (*b*) there was no great reason to be satisfied either with the presumption, or the way in which it is got rid of: but he says, he must presume the testator to be apprized of it, as a rule of law. The evidence in this cause gives the most satisfactory information that this testator did not so understand it. The natural presumption is, that by not revoking the will, he intended it should take effect. If, however, the other presumption has become the law of the country, and the mere circumstance of advancing a portion is of itself a revocation, still if there is satisfactory evidence that the testator did not know the effect of that advancement to revoke the legacy, that is the most satisfactory evidence, that he did intend both provisions to take effect. Your Lordship has thrown out a difficulty; that, after this conversation took place, a considerable advance was made by the father, and upon the occasion of that very marriage; which shows a different intention between the time of the conversation and the marriage. But the case of *Debeze* v. *Mann* (*c*) has exactly the same circumstance: the sum of 600*l.* was advanced after the marriage, but upon occasion of the marriage: *viz.* to buy furniture. The conversation with *Mrs. Brown* accounts for his giving 7000*l.* [513] instead of 5000*l.* The contracts he had entered into made it inconvenient to him to advance the money as he intended. There is an analogy between this sort of case and the cases of implied revocation of a will; as by marriage and the birth of a child. (*a*) This is a presumptive revocation of that part of the will. As in those cases, the presumption may be rebutted: that is, if it appears the testator did mean that his child should take the benefit under the will. Lord *Thurlow's* way of considering it, in *Ellison* v. *Cookson*, is very accurate.

Mr. Mansfield, Mr. Richards, and Mr. Cox, for the Defendants.—There is no evidence in this case, that can defeat the general rule of presumption, perhaps unfortunately laid down as a rule. Lord *Thurlow* considers (*b*) these presumptions as presumptions of law, and therefore not to be sent to a jury; and yet they are to be met by evidence. It is unfortunate: but this Court has laid down these general rules, calling them presumptions of law; and it is impossible to refuse evidence certainly, as no presumption can stand longer than till the contrary is shown. The parol evidence can amount to nothing, unless it satisfies the Court that he intended 7000*l.* by the settlement, and 5000*l.* by the will. This evidence is as doubtful as can be imagined; very unlike that in *Debeze* v. *Mann*, which, though slight, is the evidence of the father of the husband, that the father of the wife told him, he could only give her 1000*l.* on her marriage, but she would have more hereafter, as his life was a bad one. The only explanation of that is, that she would have more at his death. The conversa-

(*a*) 2 *Bro. C. C.* 507. 3 *Bro. C. C.* 61. *ante*, vol. i. 100.

(*b*) *Ante*, vol. i. 109.

(*c*) 2 *Bro. C. C.* 165.

(*a*) ... see *Ex parte The Earl of Ilchester*, *ante*, 348: where this subject is discussed; and the principal authorities referred.

(*b*) *Ante*, vol. i. 108.

tion was between two persons, standing in the place of parents to the parties: their attention drawn to the subject. This is mere gossiping conversation: having no reference to the subject *of the settlement; applicable to the intention several months before. The witness had nothing to do with it; and the question was a surprise upon the testator, who never meant to enter into the discussion. There is the most marked distinction between the two cases. *Ellison* v. *Cookson* stands upon peculiar grounds. In the cases between the executors and next of kin, (*a*) a strong distinction has been made between the time of executing the will and any other time; (*b*) and very properly; for, how is evidence of the intention at one time to evidence it at another?

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Mr. Alexander, in Reply.—It is sufficient to support this claim to show, the testator understood his will would operate; which upon the evidence is clear. Suppose in the case of the executor, and next of kin, which is analogous, the conversation had not been upon the express intention; but imported, that the testator understood that a legacy to the executor would not turn him into a trustee: would not that be as prevailing as the most distinct declaration of intention? In those cases, there is no objection to the declarations not being at the time of the will; and many decisions have been upon declarations subsequent. At all events, there is only an ademption *pro tanto*, to the extent of 2000*l*.

The Lord CHANCELLOR. I do not hesitate upon this particular species of case to say, I give my opinion without a hope that any decision will afford satisfaction to every one who looks at the circumstances; and in a case of parol evidence, upon which it is not possible to hope that the minds of all should concur. It appears that different judges have formed very different opinions upon the nature of the rule in this Court. It is obvious that Lord *Thurlow*, if it had been *res integra*, would have disapproved the establishment of it; and Lord *Kenyon*, in *Ellison* v. *Cookson*, thought it a very wholesome rule. Many observations occur, upon similar presumptions, in the case of executor and next of kin; and *Mr. Justice Buller* went the length of intimating, (*a*) that if he had set here longer, he would have driven parol evidence out. I say nothing of the nature of any of these rules. It is clearly decided, that there is such a presumption. It is also clearly established, that parol evidence is admissible to rebut the presumption; and my business is dryly to determine, whether the parol evidence in this case has sufficient weight and power to overthrow the presumption, which, it is admitted, must *primâ facie* be applied. It is not the habit of this Court to direct an issue either upon a case of this kind, or such as *Nourse* v. *Finch*: (*b*) but the rule is settled, that where a parent, or a person in *loco parentis*,

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(*a*) *Nisbett* v. *Murray, ante*, vol. v. 149, and the references in the note 158. *Abbott* v. *Abbott, ante*, vol. vi. 343. *Urquhart* v. *King, ante*, 225.

(*b*) *Ante*, vol. i. 369.

(*a*) p. 515. *Ante*, vol. i. 357, in *Nourse* v. *Finch*. (*b*) *Ante*, vol. i. 344.

1802. TRIMMER v. BAYNE.

Distinction as to satisfaction between the case of double portions and performance of a covenant.

In the former small circumstances of difference are overlooked.

gives a legacy as a portion, and afterwards, upon marriage, or any other occasion calling for it, advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will; and this Court will presume, he meant to satisfy the one by the other. It differs from the performance or satisfaction of a covenant in this; that the Court overlooks small differences in the circumstances of that, which is proposed to be given, and that, in satisfaction of which it is contended to be given.(c) The Court does not inquire, whether the portion by the will is entirely and absolutely to the child; or what is afterwards advanced [* 516] *in this form; a settlement upon marriage; which not being a performance of a covenant or satisfaction of a debt, yet is a presumed satisfaction of the intended portion.

Under the circumstances of this case, I do not conceive that the fact of the limitation of this property upon the marriage can be such a difference with regard to what was intended by the will and advancement under the marriage contract, that upon that it can be said there is no ademption. In ordinary cases, without examining whether it would be satisfactory to say, this Court should adopt this rule, if it were *res integra*, I think, if you came to the resolution not to adopt it, you would not say so in the particular case; and it is well worthy of discussion, whether it should not prevail in this particular case, even if it was not to be stated as a general rule; for the legacy is given by the will with express and peculiar reference to the marriage of the daughter; looking to the fact or the event of marriage: being given as a provision for her sole and separate use to trustees to be paid upon her marriage, or if she should be married at his decease. Upon the treaty of marriage she had an inchoate title to the portion or fortune, to be paid upon her marriage under the will. It cannot be disputed, that if there was nothing more than the will and the settlement, the latter would be an ademption. The execution of it is a fact to be looked at as a fact of evidence. The settlement itself is very material evidence of the intention of the parties, and of the testator as one party; for it is written evidence; and also it is final evidence of his intention. But it is said, though upon the gifts provided by the settlement, and still more upon the recitals, what is given is to be taken as an advancement of portion, and therefore in ordinary cases an ademption, yet the evidence is so applied to the act done by the testator upon the 3d of *December*, [517] 1794, the final act done by him, that under the circumstances the declarations are sufficient to control the admitted effect of the settlement in this Court.

In the case of *Ellison* v. *Cookson* I had a large share. I knew some of the parties very intimately; and am perfectly sure the case was rightly decided. But it was decided upon grounds of imputation as to what the testator thought, meant, and knew, as to the rules of law; which he could not understand, even as to

(c) The same principle prevails in the case of double portions by a settlement and a subsequent will. *Hinchcliffe* v. *Hinchcliffe*. *Sparkes* v. *Cator*, ante, vol. iii. 516. 530.

the terms in which they are expressed. It was impossible to talk to the family upon the subject in terms which they could understand. *Debeze* v. *Mann* is a much more simple case, upon this ground, that the father of one of the parties talking to the father of the other, upon the subject of the marriage, used an expression, from which Lord *Thurlow* concluded, and it is clear he acted upon the idea, that that person using it stated to the other in that conversation, that what he then meant to advance would not be all, and connecting the future advance with his death, by the expression used about his life, as an advance at that time, the principle of that decision appears, that the advancement of the 600*l.* together with the other sum advanced upon the marriage, would not within the meaning of that conversation satisfy what was given by the will ... the ...*l.* which therefore was not ademed.

The case of *Hinson* v. *Cookson* turned entirely upon this, and it shews the danger of this sort of parol evidence. *Bull*, a lawyer, and a very accurate man, clearly misunderstood old *Cookson*; and if that letter had not been written, *Hinson* would have got both. But *Cookson* being determined at hearing the import of the conversation, wrote to shew that was not his meaning. I knew ... much of the family, and it was his determined purpose that, if his wife survived, the younger children should depend upon her, and not upon him. Therefore he said, he meant it ... if his wife should survive him, and should not think proper to continue it. Lord *Thurlow* under those circumstances thought it altogether in the power of the widow. The principle is the same as that in *Debeze* v. *Mann* with regard to parol declaration. I take it in the case, where the executor is a trustee for the next of kin. I fear, there is no possibility of saying, parol declarations both previous and subsequent are not admissible, though Lord *Cowper* would hardly have been brought to let them in as well as declarations at the time. But there is a very great difference, as also upon these marriage treaties, upon the point, whether they are all alike weighty and efficacious. A declaration at the time of making the will is of more consequence than one afterwards, and a declaration after the will, as to what he had done, (I am speaking as to the time merely) is entitled to more credit than one before the will, as to what he intended to do; for that intention may very well be altered. but he knows what he has done, and is much more likely to speak correctly as to that than as to what he proposes to do; though these parol declarations are all alike admissible; whether consisting of conversation with people, who have nothing to do with it, people making impertinent inquiries, and drawing from him angry answers, or in whatever form, they are all evidence. But they are entitled to very different credit and weight according to the time and circumstances. In *Debeze* v. *Mann* the conversation between the two fathers upon the subject of the very contract, between two persons under a parental obligation to provide rationally for the interests of their children, upon every ground is entitled to much more weight than some others. So in *Ellison* v. *Cookson;* when

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Where the executor is trustee of the residue for the next of kin, parol declarations previous and subsequent to the will are admissible; but their weight and efficacy very different.

1802. TRIMMER v. BAYNE. old *Ellison* took the trouble to send a brother-in-law to the country to talk upon the subject; an authorized agent in the treaty; speaking of declarations between him and the principal, to settle the terms of the contract of marriage. That evidence has a character, that does not belong to such as occurs in this case.

[*519] It does not appear from the evidence of any man of business, of any person having an interest of affection, piety, or of any other kind, what hope was held out to *Trimmer*, other than by the instrument, as to what was to be the fortune. It does not appear, that *Trimmer* ever heard this conversation with *Mrs. Brown* had passed. It was not therefore had among parties having any sort of interest. I do not say, by any means, that therefore it is not evidence. It does not appear by any declaration of the testator, that he was anxious *Mrs. Brown* should know any thing more than that a marriage was intended, or, that, unless she had provoked the conversation about the fortune, she would have heard a word about it. His answer to her question was neither true according to the will or the settlement, in the sense in which she understood it. It is clear, she understood it a ready money advance; and it is clear from the conversation, the testator must have been satisfied that he misled her, and that he meant to delude her; and this shows the danger from declarations, made perhaps with that view, and sometimes necessary to keep peace in families with persons having expectations. He gives very large bequests by his will; and yet there he insinuates, that 10,000*l.* is his whole fortune. So he again endeavours to baffle this curiosity. That she understood it is very clear from her answer. It is clear, he must have known he was baffling the inquiry. To keep her quiet he says, "she is in my will:" that is, for part or the whole of that 10,000*l.* He intimates at the end, that he meant to keep part of the 10,000*l.* in his power. What had passed in the

[520] treaty in the meantime between any of the parties, principal, agent, or interested as husband and wife, does not at all appear. She attacks him again upon it at *Teddington*: and he makes the same sort of answer. It is clear, upon her evidence, she had no idea he was to advance more than 5000*l.* at that time. She does not intimate beyond that. Taking it at the highest as to his intention then, her understanding was, that he was to advance 5000*l.* upon the marriage; and she was in his will; and that declaration would be evidence, provided you believe from the whole character of the conversation, that he was serious in talking to her; which for the purpose of this cause I will believe; and if the settlement had been 5000*l.* and with this will, upon the authorities she might have had a further demand. According to the conversation *Mrs. Trimmer* was to have 5000*l.* immediately, and 5000*l.* more at her father's death. If under the contract, infusing the effect of the will and the conversation into the case, 2000*l.* was advanced, there was 5000*l.* at his death under the settlement, and if there was no satisfaction, 5000*l.* under the will; or, as it has been put for the plaintiff 3000*l.* I am clearly of opinion, it must be the 5000*l.* if any thing: and it is not a *pro tanto* ademption. That there was this variation there is no direct evidence. First, how

does it stand with the written contract? The legacy is in a more strict sense given as a marriage portion than legacies usually are. Then, not merely to try the parol evidence against a mere advance and a covenant, but as against a declaration under the hand and seal of the testator himself, and an agreement upon marriage; which is a representation and act by him, denoting his purpose subsequent to the conversation with *Mrs. Brown*. She presses him to an advance of some ready money; and he makes up his mind to do so. The settlement is a declaration under his own [521] hand, that by the portion he meant the 2000*l.* and the 5000*l.* It may be said, it is not inconsistent to add to it by this legacy: but it would be very extraordinary, and is not the natural meaning, that 2000*l.* should then be advanced, and 5000*l.* after his death upon these trusts; and another sum of 5000*l.* or 3000*l.* should be paid to her upon his death for her separate use. That must necessarily be done upon *Mrs. Brown's* evidence.

It is said for the plaintiff, it is clear, that at the time of the conversation he was not aware of this rule of law: or, if he was, he did not intend it should operate. Then you must take the conversation to be a *bona fide* declaration of his real intention; which is a great deal. But, beyond that, it does not necessarily follow by any means, that if he meant to advance 5000*l.* in *August* and leave a demand under the will, therefore in *December* he meant to advance 2000*l.* in money, and agree to advance 5000*l.* and then leave her her chance under the will. To get rid of the settlement, as adeeming the legacy, there must be some declaration as to the effect of the settlement; and I cannot infer, that because in *August* he did not understand the rule, or did not intend it should have its natural effect, therefore having afterwards substituted a different provision he was uninformed of the rule, or meant, it should not apply to the legacy. I must suppose, unless the contrary is proved, that, when he did this act, he did understand the legal effect of it; and then proof, that at a prior time he did not know it, or meant, that a different provision was not to have such effect, will not avoid the legal effect of it. That satisfies me, that it is impossible the plaintiffs can have more than the 5000*l.*; for if the ademption depends upon the circumstance, that he knew the rule, and meant it should take place, the argument for the 3000*l.* must be upon this; that he knew the 2000*l.* would adeem [522] 2000*l.* of the legacy; and knowing that he left it to adeem so much. But he could not know that at that time without also knowing, that the advance of 5000*l.* would adeem the whole. I must take him to be ignorant of the rule altogether, or to know it throughout.

Upon the whole, this evidence is not so connected with the act in *December*, 1794, as to destroy the effect of that act; operating to an ademption of this legacy; and it would be extremely dangerous, however the evidence must be allowed as admissible, to say, such evidence is sufficient to prevent the operation of a clear settled rule of law; if it is not clear and satisfactory to that point, to which it must be, to rebut the presumption according to the clear settled rule, arising out of the effect of the settlement.

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August 6th, 9th.

SIBLEY v. PERRY. (1)

Though the word "issue" will comprehend all descendants, upon the particular construction of this will it was confined to children.

The Court will not take into consideration the amount of the property or the number of objects, for the purpose of construing a will, except in the case of a specific disposition.

Legacies not specific without something marking the specific thing; as the description "my "stock," &c. A mere direction to transfer, and that so much capital be kept in the same public fund, is not sufficient.

Testator having directed a transfer of 3 per cent. Consols three months after his decease gave several other legacies of stock "as aforesaid." Those words upon the whole will referred to the description of the stock, not to the time of the transfer.

An annuitant falls under the general character of legatee; unless distinguished by the testator; entitled therefore under a residuary bequest in favour of legatees.

SAMUEL GRIFFITH, by his will, after some directions concerning his funeral, and giving to the Reverend *John Sibley* all his estate real and personal, in *trust for the payment of his debts, funeral expenses, legacies, and bequests hereafter mentioned, proceeded thus:

"Thirdly, I will, that my said trustee, whom I do appoint my "sole executor, do within three months after my decease transfer "1000*l.* stock in the public funds commonly stiled the 3 per cents "Consolidated, to each of my relations hereafter mentioned, *viz.* "to *Thomas*, *John*, *Robert*, and *Mary*, the sons and daughter of "*Mr. Thomas Dickson* or *Dixon* and *Elizabeth* his wife, late of "*Hannay* in the said county of *Chester*, if they be living at the "time of my decease; and if all or any of them shall die before "I do, then I will, that the lawful issue of every one of them so "dying before me shall share and share alike have and enjoy that "1000*l.* stock, which their respective parents if living would have "had and enjoyed.

"Fourthly, I give and bequeath unto *John*, the son of *Robert* "*Dickson* or *Dixon*, late beer brewer of the said city of *Chester*, "and of *Elizabeth* his wife, 1000*l.* stock as aforesaid if living at "the time of my death, and to his lawful issue share and share "alike if he the parent should then be dead.

"Fifthly, I give and bequeath unto my brother *Mr. John* "*Griffith*, 20*l.* sterling, and my wearing apparel, and also an an-"nuity of 50*l.* a-year during the term of his natural life, to be "paid him by two equal half yearly payments of 25*l.* during his "life; and I will, that so much capital sum be kept in the same "public fund of 3 per cents. Consols that the dividend half year-"ly thence arising will regularly and constantly allow him 25*l.* "sterling every half year during his life; and I will have the "first half yearly payment to commence *and become due from "the time whence the dividends thence arising become payable "and thenceforward be paid regularly in proportion up to the day "of his death.

"Sixthly, I likewise give and bequeath to my brother-in-law, "*George Ramsay*, Esquire, of *Marlborough Buildings*, 150*l.* stock "as aforesaid for mourning for himself and wife.

"Seventhly, I give and bequeath to each lawful issue who may "be alive at the time of my death of my father's sisters whose

(1) Cited 3 Desaus. Cha. Rep. 382.

"names were *Martha*, *Mary*, and *Rebecca*, and who married persons of the names following, *viz.* *Martha* married *Mr. Roger Parry* or *Perry*, *Mary* married *Mr. Robert Cowduck*, and *Rebecca* married *Mr. John Fearnall*, all of whom were late of the city or county of *Chester* aforesaid, to each, I say, of them then living, and lawful issue, I give and bequeath 140*l.* stock as aforesaid.

"Eighthly, I give and bequeath to each of the lawful issue, and also to the widow of the late Reverend *Thomas Denson*, late curate of *Dodleston*, near *Chester*, 130*l.* stock as aforesaid, if living at my decease.

"Ninthly, I give and bequeath to each of the lawful issue of *Mr. Robert Denson*, late of *Wervin*, near *Chester*, who may be living at the time of my decease, 120*l.* stock as aforesaid.

"Tenthly, I give and bequeath to Captain *Anthony Gibbs*, of the Royal Navy, and *Frances* his wife, and likewise to each of their children who may be living at the time of my decease, 140*l.* stock as aforesaid.

"Eleventhly, I give and bequeath to *Mrs. Christian Rodd*, the widow of the late Reverend *John Rodd*, Rector of *Barton-on-the-Heath*, in *Warwickshire*, and also to each of her daughters, *Miss Christian Rodd*, and *Mrs. Lucy Nash* the wife of the Reverend *Mr. Nash*, of *Euston*, in the county of *Oxford*, 130*l.* stock as aforesaid, to each who shall be living at the time of my decease, and likewise 50*l.* stock to *Joseph* the son of the Reverend *Mr. Somerscales* and *Frances* his wife; both of which are deceased. [525]

"Twelfthly, I give and bequeath to *Mrs. Frances Dayrell*, the wife of the Reverend *Mr. Dayrell*, of *Littlingston Dayrell*, in the county of *Berks*, if living at the time of my death, 130*l.* stock as aforesaid.

"Thirteenthly, I give and bequeath to *Miss Sophia Stubbs*, the particular friend of my late dearly beloved daughter, who now lives with the Reverend *Mr. Estwick*, at a church near *Oundle*, 400*l.* stock as aforesaid, if she be living at the time of my decease.

"Fourteenthly, I give and bequeath to each of the daughters of the Reverend *John Sibley*, my trustee and executor, who shall be living at the time of my death, 120*l.* stock as aforesaid."

The testator then, after some other legacies to Charities and individuals, with regard to all the residue of his estate, real and personal, gave and bequeathed it also in and upon trust to *John Sibley*, to purchase land, wherever it may best and cheapest be done, in any part of *England* or *Wales*, and to appropriate the same, and all the rents and profits thence arising, in trust for ever to the present Vicar of *Backford*, and to his successors for ever, for the maintenance and support of a school in the said parish; [526] where all the poor children, from the age of six to fourteen, shall be instructed gratis, in reading English, writing, and arithmetic, by a master appointed by the said vicar and his successors.

Lastly, the testator directed, that should any of the legacies or

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bequests before mentioned become void or lapse, by reason of the death of any of the parties, or on account of the Mortmain Act, or the Statute of Limitations, or for any other cause, his said trustee should divide the same among the other legatees, in proportion to the several bequests before made to them.

The testator died in 1796. The bill was filed by the trustee; praying, that the will should be established, and the accounts taken; and that the rights of the persons claiming may be declared, and particularly, what persons the testator meant by the description of lawful issue of his father's three sisters named in the will, and of the Reverend *Thomas Denson* and *Robert Denson;* and if the said bequest to the Charity should be declared void, that the residue may be divided among the defendants, or such other persons mentioned in the will as the Court shall declare entitled. Upon the supposition that grandchildren and great grandchildren were comprehended, the number of legatees would be so great as to exhaust the whole personal estate.

Mr. Mansfield, for some of the Children, was stopped by the *Lord Chancellor*, who observed, that in this will the word "issue" must mean "children."

Mr. Benyon, for some of the Grandchildren, and Mr. Alexander, for others, relied upon *Parsley* v. *Freeman*, (a) in which the [527] *Lord Chancellor* considered himself bound by authority against his opinion upon the meaning of the words, and *Davenport* v. *Hanbury*. (a) As to the comparison of the quantity of the fund, and the number of objects, they remarked, that it had been considered, that such a reference ought not to have been made in *Andrews* v. *Emmot;* (b) that nothing dehors the will can be produced to explain the words.

The Lord CHANCELLOR. I agree, we must not go out of the will. I also agree, we must find in the will reason to limit the words. It is clear, in many clauses of this will the testator meant children: where parents, and still more where children are spoken of. Where he knows the parents are living, he gives to them: where they are not living, he gives to those he calls "lawful issue." At present, I think it must be construed children.

The next day the *Lord Chancellor* expressed considerable doubt upon looking into the authorities, whether this opinion was not too hasty: and directed it to be spoken to.

August 9th.

Mr. Mansfield, Mr. Lloyd, Mr. Richards, and Mr. Whishaw, for the Children.—In some clauses of this will, the third and fourth for instance, the testator has expressed himself so clearly, that there can be no doubt; and upon the true construction of the whole will it must be so confined; though after the cases decided it must be admitted, that the word "issue" may comprehend all

(a) *Ante*, vol. iii. 421.

(a) p. 527. *Ante*, vol. iii. 257. (b) 2 *Bro. C. C.* 297.

descendants. Unless the Court is absolutely bound, they will not construe a will in so irrational a way; but will rather feel an inclination to confine it; as in the case of legacies to relations, it is confined according to the Statute of Distributions. *(a)* So upon legacies to grandchildren, the Court has refused to extend it to great grandchildren. Having so distinctly pointed out children in several clauses, it is difficult to conceive that he could mean any thing else by that word in others. That is also the sense in which testators generally use the word. The nature of the gift must be taken into consideration. To satisfy the extended sense of the word, he must have a very large property. The first rule in all writers upon law is, that instruments of all sorts are to be construed according to their subject matter. In *Cole* v. *Rawlinson*, *(b)* where Lord *Holt* differed from the other Judges, they grounded themselves much upon the subject being a reversion; and that construction has always been considered as properly prevailing. The fifth clause shows that was a specific legacy; directing, that so much capital "be kept" in the same fund.

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Mr. Benyon, in Reply.—As to the subject matter, in a case *(c)* before Lord *Kenyon*, it was held, that it was impossible to look at the value of a charge upon an estate devised, in order to decide whether an estate for life or in fee passed. The word "children" has been construed "issue;" and the word "parent" is not confined to the father. It may mean grandfather. But upon this will, that argument is not required. The general nature of the [529] clauses being quite different, and different words being used, the testator may be construed to have a different meaning. The case of *Wythe* v. *Thurlston* *(a)* is very strong for the general sense of the word "issue."

The Lord CHANCELLOR. I had not the least doubt, the actual intention of this testator was to give so much stock as he specifically had to persons under the word "issue," meaning children. But upon the authorities, and considering what might have been the case, if he had made any change whatever in the nature of the property, it is extremely difficult to put any other construction upon it as a Judge, than that which as an individual I have no doubt was the meaning. The testator contemplates the case of persons, of whose existence or non-existence he was not sure; giving to them, in the first place; and if they should not be living at the time of his decease, he substitutes other persons in their place; and upon all the authorities, it must be admitted, that if in the third clause the words "respective parents" were not inserted, the words "lawful issue" must be extended beyond chil-

(a) 22 and 23 *Char.* II. c. 10. 29 *Char.* II. c. 3. *(b)* *Salk.* 234.

(c) See *Doe* v. *Richards*, 3 *Term Rep.* 356. *Andrew* v. *Southouse*, 5 *Term. Rep.* 292. *Denn* v. *Mellor*, 5 *Term. Rep* 558; the reversal of which judgment by the Court of Exchequer Chamber, 3 *Anstr.* 781. 1 *Bos & Pu.* 558, was reversed in the House of Lords, and the judgment of the Court of King's Bench affirmed. 7 *Parl. Cas.* Oct. Tit. "*Will.*"

(a) p. 529. *Amb.* 555. 1 *Ves.* 196. See *Ante*, vol. iii. 258

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dren. He gives first 1000*l.* stock specifically: so that the legacy would fail, he should sell out the stock; though nothing could be more contrary to his actual intention, than that, if he had sold out the stock, and placed the money upon a mortgage, the legacy should have failed. I have no doubt in private, that, directing a transfer of stock, he means to give what he has: but there is no case deciding that it is specific, without something marking the specific thing, the very *Corpus:* (1) without describing it as
[530] standing in his name, or by the expression, "my stock," &c. Here you must determine each legacy to be specific, before you can raise the argument; if it is admissible. Unless I can do that unless I can say his intention was that the legacy should fail if the stock was parted with, I cannot say he meant the one or the other, because he happened to have so much stock at the date of the will; for otherwise there is no legal ground for that construction. (*a*)

In the clause I have already referred to, it is fair to put the ordinary sense upon the word "parent:" *viz.* father or mother. and there the word "issue" means children. That is the most strong upon the next clause; in which, it is clear, he did not mean grandfather by the expression, "if the parent should then be dead." Upon the fifth clause, directing that so much capital be kept in the same fund, it was argued that this legacy at least was specific. I am not aware, judicially, that it is sufficient even for that legacy. for there is nothing more in these words than in the expression, "do transfer," in order to keep. The inclination of Courts has been indulged to such an extent, in order to prevent legacies from being disappointed in substance, and they have been so anxious to procure the legatees the bounty in some cases, that they have construed words giving the specific *Corpus*, as a direction to purchase that thing. But if this clause would necessarily make this specific, suppose he had changed his property, and left no more than that stock: the Court would have been much tortured in saying, that because upon this particular expression this bequest
[531] is specific, therefore all the others are specific; not upon expressions contained in them, but by reference to this particular legacy; when that inference would have destroyed, under those circumstances, every other bounty contained in the will. Therefore I do not think, if he had changed his property from the funds to mortgage, all the rest would have failed; which must be the necessary consequence, if they are specific.

It is not to be forgot, that in all probability the children might be as old as himself. Upon all the cases, this word *primâ facie* will take in descendants beyond immediate issue. But on the other hand, there is no denying, (not applying to the state of the

(*a*) The inclination of the Court is against specific legacies. See *Chaworth* v. *Beech*, *Innes* v. *Johnson*, *Kirby* v. *Potter*, *ante*, vol. iv. 555, 568, 748, and the references in the note (*b*) 750. *Raymond* v. *Brodbelt*, *Barton* v. *Cooke*, *ante*, vol. v. 199, 461.

(1) *Cogdell's Ex.* v. *Cogdell's Heirs*, 3 Desaus. Cha. Rep. 382.

fund or the number of persons) that if, upon fair reasoning, deduced from the words of the will, all the contents and the design and tenor of it, as manifested by its contents, show it was meant in the more restrained sense, that sense may be given to it. The clauses of this will to which I have referred, show, the testator was likely to use the words "lawful issue" as descriptive of children only, and the question is, whether upon the whole will taken together he did use them in that sense. Observe the tenor and design of the will. It is to give to persons living, whom in some instances he states, and in others conjectures, to be living, certain legacies, if they shall be alive at his death; and, if dead, to substitute their issue, that is, children, in their room. Then he takes [illegible] as to those he considers dead; and gives to their lawful [illegible] Is it a strain beyond what the Court may go, in the construction of the will upon all its parts, to say, that, substituting children under the words "lawful issue," in the room of those he knew, and of those he conjectured, to be dead, but whom he would [illegible] over, as they might be living, where he treats the parents [illegible]d, he meant the same by the same words? If that can be [illegible]d upon this will, it applies also to the legacy to the issue [illegible] *D[illegible]son*; and though a small circumstance, it is not [illegible], that the gift to the issue is connected with that to the [illegible]. I take the will to mean, that in general he meant to give to children, that he has given to children *eo nomine*; that he has given to children under the name of daughters and by the terms "lawful issue;" and that in different parts, as to many of the legacies, he has considered "children, daughters," and "lawful "issue," synonymous. Then does so much of the will, upon the whole face of the will itself, furnish a fair ground for saying, that as to two or three particular legacies he meant what in every other part of the will he meant by those terms? Upon the whole will I incline to the opinion, that he meant children.

1802.

SIBLEY v. PERRY.

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I have stated the grounds of my opinion, as I should be extremely sorry if this case had passed with as little observation as was near being thrown upon it; for, at last, I have not so much confidence in my opinion, as to have altered the contrary determination, if it had come before me upon Appeal. Cases of this kind, considering the precedent authorities, ought not to pass without observation. This decision is not right, unless upon the construction furnished by the different parts of this will. I lay no stress upon the state of the fund or the number of persons: as to the first, for this reason; that, before I could raise the question, I must determine, whether these are specific legacies, or not: if not, and I am to resort to the ground that has been taken, that then the testator must have a very large fortune, there is great difficulty in reconciling the judgment upon that principle to decided cases; for as to that, there is no difference between this and *Andrews* v. *Emmot*. It was there argued, that the testator had not property enough without that which was the subject of the power; and therefore he must have intended to comprehend that. No, said the Court: you cannot go into that: you cannot inquire into the state of his property at the date of the will, his expecta-

1802. Sibley v. Perry.

tions, &c.: the will not being to operate till a future time, there would be no end of it. So in this case, if upon the face of the will he must be held to have given general legacies of stock, it must be so: and, whether he had money to buy it, or not, cannot be taken into consideration upon the construction of this will. The case *Mr. Benyon* alluded to was very clear; for where a person is to pay absolutely out of what is given to him, it signifies very little, whether what he is to pay is more or less; and whether the estate is large or inconsiderable; for he may die, before he has received any thing. Another case, before Lord *Mansfield*, was thought pretty strong; where it was decided, that you are to inquire into the value, to determine what is the limitation: but there the testator having recited that he meant equally valuable interests to each of the devisees, that recital justified the Court in looking at the value of the interest given to one, in order to determine how extensive the interest of the others should be; whether it should be equal to the value of that which in clear and unambiguous terms he had given to one.

I shall express the ground of my opinion in the declaration. Declare, that upon the true construction of this will, and the whole of it taken together, the testator, by the words "lawful issue" in these clauses, meant children; and the distribution shall be accordingly.

A few days afterwards, the Lord *Chancellor* intimated, that all these bequests of stock were, under the effect of the words "as "aforesaid," to be valued as transferred at the end of three months after the testator's death. Upon that point, the cause stood for judgment.

[534] *August 17th.*

The Lord Chancellor. There are not words enough in this will to support my idea, that the stock was to be transferred at the end of three months after the death of the testator; except as to the fund of 1000*l.* expressly directed to be transferred at that time; which is therefore clearly to be valued at that time. With regard to all the rest except one, there is not a word to make it specific: nor is there, what he might mean, any word in the bequest of any, that can be construed as denoting the time at which the transfer was to be made, except the words "as aforesaid:" but upon the whole will, I apprehend they mean only "3 per cent. "Consols;" and I am the rather of that opinion, as in some bequests the expression is "stock aforesaid," not "as aforesaid;" in others only "stock." The consequence is, therefore, as to those with respect to which no time is mentioned, the value must be taken at the end of a year, the usual time.

The annuitant is clearly entitled to a share of the residue. The rule is, that an annuitant will fall under the general character of legatee, unless there is something, as in *Nannock* v. *Horton*, (a)

(a) *Ante*, 391.

to show, the testator himself distinguished between them. In that I found myself upon the case of the Duke of *Bolton's* will; upon which Lord *Thurlow* held, that legacies being charged upon real estate, annuities were charged upon the real estate as legacies.

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JACKSON v. JACKSON.

ROLLS. *August* 10.

Construction of a will, giving a vested interest, though subject to a contingent charge; and creating a tenancy in common as to part of the property, and as to the residue a joint tenancy; there being nothing to control the legal effect of the words.

PAUL JACKSON, by his will, dated the 17th of *November*, 1786, after giving to his wife *Mary Jackson* all his household goods and furniture, plate, linen, beds, bedding, and all other his implements of household, as therein mentioned, gave and devised to *William Peareth*, *William Coulson*, and *Anthony Hopper*, their heirs and assigns, a house in *Newcastle*, to hold to them and the survivor and his heirs; upon trust, that they should with all convenient speed sell and dispose of his said messuage and premises; and as to the moneys to arise from the sale, he willed that the same should be placed out in the public funds by and in the names of his said trustees, in case his said wife should survive him; and that the clear half yearly dividends of the same should from time to time be paid unto his said wife during her life for her own use; and from and after the decease of his said wife, in case she survived, he directed, that his said trustees should sell and transfer the moneys so directed to be placed out in the funds as aforesaid, and should pay the money to be produced by such sale and transfer to and equally between his two daughters *Mary* and *Matilda*, or to the survivor of them (if one of them should happen to be then dead) in part discharge of the two legacies of 1200*l*. a piece, thereinafter bequeathed to his two daughters: but in case his said wife should not survive him, then he directed, that his said trustees should pay the moneys to arise by the sale of his said messuage and premises to and equally between his said two daughters or to the survivor of them (if one of them should happen to be then dead) in part discharge of the said two legacies of 1200*l*. a piece:

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And as to all other his messuages, lands, and tenements, and hereditaments, pottery mills, copperas work, mortgages in fee or otherwise, ready money, securities for money, and all other his estates and effects whatsoever, real or personal, he gave and devised the same to his said trustees for ever; upon trust in the first place for the better securing the payment unto his said wife or her assigns of the annuity of 80*l*. thereinafter by him bequeathed unto her for her life; and in the next place for securing during the life of his said wife the payment of interest after the rate of 4 per cent. *per annum* to his said two daughters or the survivor of them for the said two legacies of 1200*l*.; and from and after the decease of his said wife and full payment of the said two legacies of 1200*l*. then upon trust for such purposes as hereinafter mentioned.

The testator then gave to his said wife one clear annuity of 80*l*.; and to his daughter *Mary* 1200*l*. and to his daughter *Ma-*

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tilda 1200*l.*; and in case either of his said daughters should be dead at the time of his decease not having been married, or should after his decease die not having been married, then he willed, that the survivor should have and take the legacy of her sister so dying; and that the said two sums of 1200*l.* each should be paid and payable at such times and with such rate of interest, as therein mentioned; and subject to his said wife's annuity of 80*l.* and also charged with the payment of interest for said two legacies of 1200*l.* during the life of his said wife unto his said daughters he gave all the residue and remainder of his real estate whatsoever, and all his mortgages in fee or otherwise, and all his leasehold estates with all benefit and claim of renewal of and in the same respectively, and all other his personal estate whatsoever except his household goods and furniture to be and enure unto the said [537] trustees for ever; upon trust to permit his said two sons *William Jackson* and *Collingwood Forster Jackson*, to enter upon all his said real estates, and to occupy and possess the same at and for reasonable rents, if they his two sons should think fit, and also upon his said leasehold estates, and into the several branches of trade and business, in which he was or should be engaged or interested at the time of his decease, and jointly to manage and carry on the same under the direction and inspection of his said trustees to the best advantage, that could be made thereof or gotten therefrom during the life of his said wife; and from and after her decease and sale of his said messuage then upon trust for and out of the rents and profits of his said messuage the proceeds of his said trades and businesses, and by the sale or conversion of all or any part of his personal estates to raise and pay and make up unto his said two daughters or the survivor of them all such sums of money as the moneys arising from the sale of his said messuage should fall short, and as should be necessary to make up and discharge the said two legacies of 1200*l.* each unto his said two daughters: but, nevertheless, in case his said wife survived him more than twelve months, it was his will, that his said two sons should not be compelled to raise or to pay and discharge all such money as should be short, as aforesaid, at one time or in one payment, nor to raise or pay above 400*l.* in any one year for and towards the making up his said daughters' legacies as aforesaid; and from and after full payment and discharge of said two legacies of 1200*l.* each and all interest for the same, as aforesaid, then he directed all the residue and remainder of the said trust estates to go and to be unto and for the only use and behoof of his said two sons *William Jackson* and *Collingwood Forster Jackson*, and the survivor of them, their or his heirs, executors, administrators and assigns for ever, according to the several and [538] respective natures and tenures of such estates; and to and for no other uses, intent, and purpose, whatsoever; to take and hold his said real estates and every part thereof, in case his said two sons should both survive him, as tenants in common and not as joint tenants; and he appointed the trustees his executors.

The testator died in 1787: leaving his widow and the four children mentioned in his will surviving. The widow died in

1798. The two sons of the testator carried on together the different businesses, in which he was engaged, upon leasehold premises, the trustees interfering very little, till the death of *William Jackson;* paying the annuity to the widow, and the interest of the legacies to the daughters.

The bill was filed by *Mary Jackson*, the widow and sole executrix and residuary legatee of *William Jackson*, against the surviving brother and the trustees, praying an account; and that the plaintiff may be declared entitled to a moiety of the leasehold premises and the stock and effects of the partnership carried on by *William Jackson* and his brother, and also of all the residue [illegible] the personal estate, &c.

[illegible] defendant *Collingwood Forster Jackson* by his answer [illegible] the leasehold premises and other effects, and also all monies [illegible] from the said trade in the life of *William Jackson*, [illegible] by them, subject to the legacies to his [illegible] *Jackson* died, before they were paid; [illegible] that he did not take any vested interest [illegible] personal estate or the produce thereof: or if [illegible] the defendant took the same as joint tenants; [illegible] to sever the joint-tenancy.

[illegible] produced on both sides: for the plaintiff, that [illegible] on business from the death of the testator in [illegible] for the defendants, as to their transactions; that a [illegible] their carrying on the business under the [illegible] annual salary, till the legacies should be paid, and [illegible] of the will finally settled; and then the whole to be given [illegible] to them. The legacies of the sisters were not quite settled at the death of *William Jackson*. [539]

Mr. Richards, and Mr. Steele, for the Plaintiff.—Mr. Lloyd, and Mr. Bell, for the Defendants.

The MASTER *of the* ROLLS. It is impossible to be quite certain what the meaning of this testator was: but, when we have got the general meaning, we must not reject that, merely because we cannot get at a systematic design. It was contended, that the testator made this provision only upon a given contingency; and the question is, what was to become of the profits of the trade during the life of the wife, and till the payment of the legacies to the daughters. I should apprehend, a mere direction to let his sons into the trade would be a bequest to them of the profits, if the contrary intention did not appear from the rest of the will. But, so far from that, it is evident from another part of the will, that the testator conceived he had given the benefit of the trade to his sons in the meantime; for, after his wife's death, providing a further fund for raising his daughters' portions, *viz.* the rents and profits and the proceeds of his trade, he immediately annexes a declaration, that in case his wife survived him more than twelve months, his sons should not be called upon to pay all such money as should be short in one payment, nor above 400*l.* in any one *August* 10 [illegible]

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year. It is evident, then, all beyond 400*l.* a-year was to be the sons'. It is evident he did not mean the profits to accumulate to form a fund for the daughters' legacies; for they were to receive their legacies, after the wife's death, by annual instalments. That is the only rational object for which he could wish them to accumulate; for it is absurd to suppose he meant that accumulation, in order to give it to the sons, or the survivor, at the wife's death; to keep them without any provision during her life, merely for that purpose of giving the accumulation to them, or one of them, afterwards.

The case of *Saunders* v. *Lowe (a)* is not unlike this; but is much stronger in favour of the literal construction, and against a division till the death of the survivor. In this will, it is mere implication, from his not expressly giving the profits in the mean-time to his two sons. There was no such strong circumstance there as here; providing guards to prevent his sons being called upon to pay, in any one year, more than they could afford out of the profits of the trade; which necessarily implies, that the remainder of the profits was to be their own.

The testator then makes this residuary disposition. With regard to this, it is clear, that upon the words there is a joint-tenancy as to the personal estate; and I do not see any clear intention for a tenancy in common. I have nothing to go upon in putting any other construction upon the words than that which is their legal effect. It is true, as it was argued, this may be somewhat of an absurd disposition; giving part of his estate between his sons as tenants in common, and the residue between them as joint tenants. As to that I can only say, in the one case it is ra- [541] tional to construe him to have meant, that they should take the profits as they accrued; and there is a circumstance, from which it evidently appears such was the intention. As to the bequest of the residue, it is positive; and there are no circumstances by which I can be guided in giving the words a different construction from that which they literally import. Therefore the profits accrued before the wife's death are divisible between the sons; and belonged to them as received in their several rights: but the residue belonged to the survivor. It would be just the same if the word "survivor" was not used; the words being those of joint-tenancy. (a)

(a) 2 *Black.* 1014.
(a) p. 541. *Morley* v. *Bird. Stuart* v. *Bruce, ante,* vol. iii. 628. 632.

1802.

PETTIWARD *v.* PRESCOTT.

ROLLS. *June* 21*st*. *August* 10*th*.

The heir claiming under a will, and against it a copyhold estate unsurrendered, put to his election.

Devise of "my copyhold "estate at P. "consisting of "3 tenements, "and now under lease," &c.; but not specifying for what interest: an estate for life only passes.

Account of rents and profits confined to the filing of the bill under special circumstances; as laches by the *Cestuy que trust* in not asserting his right. (1)

RICHARD ASTLEY, by his will, dated the 15th of *February*, 1778, gave and bequeathed to his brother, *John Astley*, 1500*l.*; and discharged him from all debts due to the testator at the time of his decease, whether by bond or mortgage, with all interest due upon the same; and he gave to *Roger Pettiward* a copyhold estate in the following manner: "I give to *Roger Pettiward* my "copyhold estate at *Putney*, consisting of three tenements, and "now under lease to" *A. B.* "for a term of 14 years, at the yearly "rent of 30*l.*"

The testator then gave all the residue and remainder of his estate, not disposed of by his will, to his said brother.

The testator died in *December*, 1780. Afterwards it was discovered, that on the surrender of the testator and * his wife of the copyhold estate at *Putney*, they were admitted to the use of themselves, for their lives and the life of the survivor, and after the death of the survivor to the use of such person or persons, for such estate or estates as they or the survivor should by any deed or writing, executed in the presence of two or more witnesses, appoint; and in default thereof, to the use of the right heirs of the survivor for ever.

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The testator survived his wife. No appointment was executed; and the will was not attested by two witnesses. Upon the death of the testator, his brother and heir, *John Astley*, was admitted; and having surrendered to the use of his will, dated the 9th of *November*, 1787, he devised all his copyhold estates at *Putney*, among other estates, subject to a trust by mortgage or sale to discharge his debts and legacies. He died on the 14th of *November* following. The trustees under his will, mortgaged the copyhold estate at *Putney* with other estates.

The bill was filed upon the 6th of *June*, 1799, by *Roger Pettiward*: praying, that the will of *Richard Astley* may be confirmed, and the copyhold estate surrendered to the plaintiff and his heirs discharged from the mortgage; and an account, charging the mortgagee with notice; and that *John Astley* was indebted to the testator; and was benefited by the will to a much greater amount than the value of the estate; and was therefore bound to confirm the devise.

The answer of the trustees, under the will of *John Astley*, stated, that the plaintiff's mother, to each of whose children a legacy of 100*l.* was given by the will of *Richard Astley*, refusing to perform an agreement for the demise of a house, which was disposed of by the will, an arrangement took place; under which *John Astley* was to take the copyhold estate, the plaintiff was to have his legacy; and the house was to be given up to his mother; and under that agreement *John Astley* was admitted; and continued

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{(1) See 3 Desaus. Cha. Rep. 522, *note*.}

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in possession till his death; and considered himself absolutely entitled; and afterwards mortgaged that estate with others, and submitted, whether under the circumstances, and particularly as the plaintiff has acquiesced so great a length of time under the arrangement, and permitted *John Astley* and those claiming under him to be in possession for near twenty years, without making any claim, the premises ought to be surrendered; insisting, that if the plaintiff has any right, he has only an estate for life, and not an estate of inheritance; and that the reversion in fee, subject to his life interest, was well devised.

Mr. Richards, and Mr. Leach, for the Plaintiff, insisted, that there was no case in which the word "estate" has been limited to mere locality, though expressions to that effect have been thrown out; and that the mere description in what the property consists cannot effect it.

Mr. Romilly, and Mr. Pemberton, for the Defendant.—The word "estate" may mean either the land or the interest in it; and standing alone may be understood to mean both. But, where the testator goes on, as in this instance, to explain what he means, "consisting of 3 tenements," &c. it is exactly the same as if he had not used the word "estate." There are many cases, in which the word, used generally, has been held not to mean any thing but the land devised. Others have turned upon the words "in" and "at;" deciding, that the one would, the other would not, carry the fee: *Barry* v. *Edgeworth.* (a) *Fletcher* v. *Smiton* (b) is a
[544] strong authority for limiting the words in this case. The plaintiff therefore could only be entitled to an estate for life.

The account, at all events, must be confined to six years at most.

Mr. Richards, in Reply.—The word "estate," in this will, must be intended to carry the whole interest. No decision has been made upon the distinction between the words "at" and "in;" which has no sense in it. The word may be qualified: but it is enough to say, these words do not qualify it. It must be admitted, that if the devise had been expressed "all my copyhold estate at *Putney,*" that would have done. The word "estate" carries more than "land." The description was for the purpose of distinguishing it from all his other property: or if he has none, it may be accounted for by habit.

Upon the other point, the plaintiff is entitled to insist upon the account for the whole time; and is not to be limited to six years. There is no instance of so confining the account, where there is a trustee; as this defendant admits himself to have been receiving the rents since 1780. No Statute of Limitations applies here. The property belongs to the plaintiff, the *Cestuy que trust;* and under the circumstances, the rents and profits also belong to him.

August 10th. *The* MASTER *of the* ROLLS. It is not disputed by the defendants, that this was a case of election; they elect to take un-

(a) 2 *P. Will.* 523. 1 Eq. Ca. Ab. 178. *Pl.* 18 (b) 2 *Term Rep.* 656

der the will. Perhaps if it had been *res integra*, whether in the case of an unsurrendered copyhold, upon which the will can have no operation, the heir should be put to election, * that would have borne a question. It is, however, settled that he shall. (a) 1802.

But for the defendants it is insisted, the plaintiff takes only an estate for life: and that the account of the rents and profits ought to be only from the filing of the bill. Upon the construction of the defendants I would have made a case, if the parties had not wished that I should take upon myself the decision of the question; the property being small. At an early period, it was doubted whether the word "estate" merely was to be applied to the land only, or to the interest in it. It has been long settled, that it is of itself sufficient to carry the fee. But, when words of locality, as "in" or "at" a particular place, are added, the question is, whether they do not narrow and restrain the import of that word. So lately as Lord *Talbot's* time, this was a subject of doubt and controversy. In *Ibbetson* v. *Beckwith*, (b) it was strenuously argued, that under a devise of "all my estate," nothing passed but an estate for life. It does not appear from the report, but is stated in a note in *Peere Williams*, (c) that that case first came on at the *Rolls*; where it was held, that the devisee took only an estate for life. Lord *Talbot*, however, was of opinion, not, as may be collected from his judgment, that these words of themselves necessarily imported a fee, but, that upon the whole will it was sufficiently apparent, that the devisor meant a fee to pass. Some years afterwards, *Goodwyn* v. *Goodwyn* (d) occurred before Lord *Hardwicke*; who expressed much doubt whether the estate passes in fee by force of the words "all my "estates." The question remained undecided; and no case very nearly resembling it has since received a decision. But both Lord *Mansfield* and Lord *Kenyon* have stated opinions similar to that, to which Lord *Hardwicke* appears to have inclined: the former, in *Hogan* v. *Jackson*: (a) and in *Fletcher* v. *Smiton* Lord *Kenyon* says, (b) "There are cases, in which nice distinc-"tions have been taken between a devise of an estate at such a "place, and a devise of an estate in a particular place; and Lord "*Hardwicke* alluded to it in the case cited in *Vesey*: (c) but he "added, that there is no case, in which it is held, that a fee pass-"ed by the devise of an estate, if the testator added to it 'in the "occupation of any particular tenant.' And I admit, that the "word 'estate' may be so coupled with other words, as to ex-"plain the general sense in which it would otherwise be taken, "and to confine it to mean farms and tenements. But that is not "the present case; no such words are here superadded to es-"tates."

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The question here is, whether the superadded words do not clearly show, the devisor did not mean to speak of the quantity of his legal interest, but merely the *Corpus* or subject, in the dis-

(a) See *Marle* v. *Greenbank*, 1 *Ves.* 298. (b) *For.* 157.
(c) 2 *P. Will.* 337. (d) 1 *Ves.* 226.
(a) p. 546. *Cowp.* 299. (b) 2 *Term Rep.* 658. (c) 1 *Ves.* 228.

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position. I am of opinion, they do. The words are not "all my "estate," but "my copyhold estate at *Putney*, consisting of 3 "tenements," &c.; that is, "the estate I give you at *Putney* con-"sists of 3 tenements;" which is the same as saying, "three te-"nements compose the estate I give you:" a mere description of the thing, and not of his interest. That he meant to give the houses absolutely, there is little doubt. So a testator generally does, when giving under any description. But we must look at what he says, not at what he thought.

[547] With respect to the other point, there ought to be no account beyond the filing of the bill. There is no infant, no breach of trust, in the case. *John Astley* lives and dies in the belief that no claim was to be made upon him. Under that supposition, he disposes. Upon that supposition, those deriving under him deal with it: and after a lapse of time nearly sufficient to bar the legal remedy, if any there had been for the estate, this plaintiff asks not only the estate, but the whole rents and profits from the time the title accrued, which he has been so tardy in asserting. Constructively, it is true, the heir was a trustee of the rents and profits of the estate bound by the will: but it does not follow, that he is always so. In *Dormer* v. *Fortescue*, (a) Lord *Hardwicke* says, upon special circumstances, even in case of a trust, the Court will restrain the account to the time of bringing the bill; and he specifies, as one instance, default and neglect in not filing the bill sooner; and says, the Court has often thought fit to restrain it. (b) The plaintiff, therefore, ought in this case to be restrained from carrying the account further back.

(a) 3 *Atk* 124.
(b) 3 *Atk*. 129, 130. See the references in the note, (a) *ante*, vol vi 215

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August 10*th*, 12*th*.

MORRIS v. PRESTON.

An agreement, in 1800, for a lease of a farm to a clergyman for the purpose of occupation, is void under the Statute 21 *Hen*. VIII. c. 13.

A provision, in case of the death of a trustee, for the substitution of another, and a conveyance by the survivor so that he and the new trustee should be jointly interested in the trust, satisfied by the substitution of two trustees, after the death of both the former, and a conveyance by the heir of the survivor.

IT was referred to the Master to inquire, whether the defendants can make a good title to the estate in question; and whether there is any lease, or agreement for a lease, existing, of any part thereof; and if there * were, it was ordered, that the Master should state any particular circumstances relating thereto; and what compensation ought to be made to the plaintiff, in respect of such lease or agreement; and an injunction was directed to restrain the defendants from proceeding to a re-sale.

The Master, by his Report, certified, that the defendants could make a good title; and that there was not any lease, or agreement for a lease, existing. The defendant, *Elizabeth Preston*, on the 2d of *October*, 1800, entered into a lease, or an agreement for a lease, with the Reverend *William Gooch*: of which the following is a copy:

"An agreement made the 2d day of *October*, 1800, between "*Elizabeth Preston* and *William Gooch*, of *Fetcham*, clerk, of the "other part. Said *Elizabeth Preston* agrees to let, and the said "*William Gooch* agrees to take, the messuage late the residence "of Dr. *Preston*, deceased, and the lands which were in his own "occupation, and also the farm and lands belonging lately to the "said Dr. *Preston*, now of the said *Elizabeth Preston*, in the oc-"cupation of *Michael Steed* and *Edward Burrough*, for the term "of 7 years, at the rent of 70*l.* as to the messuage and lands late "in the occupation of the said Dr. *Preston*, and as to the lands "in the occupation of *Michael Steed* and *Edward Burrough*, "such rent as shall be determined upon by two indifferent per-"sons, one to be chosen by each party, or in case they shall not "agree, then by a third person, to be previously chosen by the "other two. The said *William Gooch* engages to lay out upon "the premises a sum of money equal to 10*l.* a-year during the "lease, and the said *Elizabeth Preston* engages that the said "*William Gooch* shall be at liberty to assign over the premises to [549] "any person except the following, *viz.* *George William Manby*, or "any friend of his."

The Master stated, that the lands, stated to be late in the occupation of Dr. *Preston*, and *Steed*, were the premises in question: yet he found that the said lease or agreement was void under the Act 21 *Henry* the Eighth. (*a*)

To this Report the plaintiff took exceptions:—First, that the Master certified, that the Defendants can make a good title: whereas he ought to have certified, that a good title cannot be made without the concurrence of *William Crooke*, the heir at law of *Samuel Crooke;* who was the surviving trustee in indentures of lease and release, dated the 7th and 8th of *April*, 1769.—Secondly, that the Master certified, that the lease, or agreement for a lease, dated the 2d of *October*, 1800, is void under the Act 21 *Henry* the Eighth; whereas he ought to have certified, that the said lease or agreement is an existing lease or agreement for a lease; and to have stated what compensation ought to be made to the plaintiff in respect of such lease or agreement.

The first exception turned upon the settlement by lease and release of the 7th and 8th of *April*, 1769, upon the marriage of the defendant *Mrs. Preston* with her late husband *Thomas Preston*, and subsequent indentures of lease and release and appointment of the 28th and 29th of *April*, 1801. By the settlement of 1769, the estate was conveyed to *William Jennings* and *Samuel Crooke*, their heirs and assigns, to the following uses (after the marriage:) to *Thomas Preston* for life without impeachment of waste; remainder to the said *William Jennings* and *Samuel* [550] *Crooke* and their heirs during the life of *Thomas Preston*, in trust to support contingent remainders; remainder to *Elizabeth Preston* and her assigns, for her life, in part of her jointure; with a similar remainder to *Jennings* and *Crooke* and their heirs during her life, to preserve contingent remainders; but nevertheless to permit the

(*a*) C. 13.

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said *Elizabeth Preston* and her assigns to receive and take the rents and profits thereof to her and their own use; remainder to trustees for five hundred years upon certain trusts; remainder to the first and other sons of the marriage successively in tail male; remainder to the daughter and daughters of the marriage as tenants in common in tail with cross remainders; remainder to *Thomas Preston* in fee.

In this settlement is contained the following proviso: first, that notwithstanding any of the limitations and trusts, it should be lawful for *Jennings* and *Crooke*, and the survivor of them, his heirs and assigns, from time to time, and at all times, during the lives of the said *Thomas Preston* and *Elizabeth Pogson*, his intended wife, and the life of the longest liver of them, by and with the consent and approbation of the said *Thomas Preston* during his life, or of the said *Elizabeth Pogson* after his death, in case she survived him; and at his or her request, testified by writing under his or her hand and seal, signed in the presence of two or more credible witnesses, but not otherwise (*inter alia*) to sell and dispose of all and every or any of the said freehold messuages, lands, tenements, hereditaments, and premises, and for that purpose to revoke, annul, and make void, all and every of the estates, limitations, trusts, powers, provisoes, and agreements, thereinbefore mentioned, declared, and contained, of and concerning the same; and to grant and release all and singular the said premises, or any part or parts thereof, to any person or persons, and his,
[551] her, or their, heirs, executors, or administrators, either together or in parcels respectively, for such price or prices in money or any such equivalent as to them or him should seem reasonable, and be consented to as aforesaid; and upon payment of the moneys to arise by any such sale or sales of any of the same premises respectively, or any part or parts thereof, when the same should be sold for a valuable consideration in money, which it is thereby agreed should be paid to and received by the said *William Jennings* and *Samuel Crooke*, or the survivor of them, and the heirs or assigns of such survivor, the said *William Jennings* and *Samuel Crooke*, and the survivor of them, his heirs or assigns, should sign and give proper receipts for the money for which the same should be so respectively sold; which receipt or receipts should be a sufficient discharge to such purchaser or purchasers for the purchase money therein to be acknowledged or expressed to be received; and he, she, or they, or his, her, or their heirs, should not, after any such receipt or receipts given, be answerable or accountable for any loss, misapplication, or non-application, of such purchase money so received, or any part thereof; and when any of the said premises should be so sold for a valuable consideration in money, the same should from thenceforth for ever remain freed and discharged of and from all the uses, estates, trusts, declarations, provisoes, and agreements, aforesaid.

Secondly.—Proviso, that in case of the death of any or either of the said trustees during the lives of the said *Thomas Preston* and *Elizabeth Pogson*, his intended wife, or the life of the sur-

vivor of them, they the said *Thomas Preston* and *Elizabeth Pogson*, or the survivor of them, may by any writing or writings under his, her, or their hands and seals or hand and seal, attested by two or more credible witnesses, with the consent of the surviving *co-trustee or co-trustees nominate and appoint some [* 552] other fit person or persons to be trustee or trustees of and in the said premises in the room or place of the trustee or trustees so dying; and that upon such nomination or appointment the surviving co-trustee shall convey and assign all and singular the said trust estates in such manner as that the said surviving trustee and trustees, and such person or persons so to be nominated and appointed shall from thenceforth be jointly and equally concerned and interested in the several trusts herein before expressed in the same manner as such surviving trustee and the person so dying would have been, in case he were living; and in like manner as often as any trustee shall happen to die during the lives of the said *Thomas Preston* and *Elizabeth Pogson*, or the life of the survivor of them, and they or the survivor of them shall nominate a new trustee with such consent as aforesaid, such new conveyance and assignment shall be made as is herein before mentioned.

By the indentures of 1801, reciting the settlement, and that *Jennings* and *Samuel Crooke* were both dead, and that *Samuel Crooke* survived *Jennings*, and *William Crooke* was his heir at law; and that *Thomas Preston* was also dead, and *Elizabeth Preston* had agreed to appoint the defendants Sir *Harry Goring* and *Thomas Sermon* trustees, in the place and stead of *Jennings* and *Samuel Crooke*, it is witnessed, and *Elizabeth Preston* by that her deed, executed in the presence of and attested by two witnesses, did nominate and appoint Sir *Harry Goring* and *Thomas Sermon* to be trustees in the place and stead of the said *Jennings* and *Samuel Crooke;* and directed *William Crooke* to convey to Sir *Harry Goring* and *Thomas Sermon*, their heirs and assigns, in such manner as should be necessary for the absolutely vesting the same in them, to and for the same uses, trusts, intents, and [553] purposes, and subject to the like powers, provisoes, declarations, and agreements as were declared by the aforesaid indenture of settlement; and *William Crooke* (by the direction and appointment of *Elizabeth Preston*) did grant, release, and confirm unto Sir *Harry Goring* and *Thomas Sermon*, their heirs and assigns, all and singular the aforesaid premises; to hold unto the said Sir *Harry Goring* and *Thomas Sermon*, their heirs and assigns, to the same several uses, for the like intents and purposes, and under and subject to the same several powers, provisoes, declarations, and agreements, as were expressed in the settlement; to the end, that Sir *Harry Goring* and *Thomas Sermon*, and the survivor of them should act and be as trustees in the place and stead of the said *William Jennings* and *Samuel Crooke* deceased.

The first exception was waived by the plaintiff without argument.

The Attorney-General, and Mr. Harvey, in support of the second Exception.—The objection taken in support of the title is,

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that this is not a lease but an agreement; and the Court could not compel the party to act upon it; for, if carried into effect, it would be contrary to the Statute. The case of *Hitchcock* v. *Thurland*, (*a*) shows the construction of the Act; for which it is difficult to find a reason certainly; that such a lease made at this day is not void; that the words "such leases" in the third section are to be considered with reference to those in the second section only, and not those in the first; and therefore no lease is declared void but those existing at the date of the Act, and not parted with before [554] Michaelmas following. In *Carter* and *Claycole's* case (*b*) *Perian* refers to *Leman's* case; (*a*) upon which he founds his opinion. All these authorities, it must be admitted, go to leases, not agreements: but under this agreement, coupled with the possession, it must be considered that the party has an interest in a lease, if not for seven years, at least a lease from year to year, independent of any thing else. It is a personal undertaking on both parts. The phrase is, "*Elizabeth Preston* agrees to let; and the said "*William Gooch* agrees to take;" and afterwards she agrees that *Gooch* shall be at liberty to assign over "*the premises*," not any lease. There is a great difference upon the point, whether *Gooch* intended it for his own occupation. He never did occupy it. The agreement was assigned to *Wray*; and possession had under that assignment.

The Lord CHANCELLOR. In *Degge's Parson's Counsellor* (*b*) and in *Greg* v. *Lampley*, (*c*) it is represented, that no spiritual person not beneficed is within this Statute. That surprised me: but, I was told that it was right; for the theory of our Ecclesiastical Constitution knows not the character of a clergyman unemployed. They must either be beneficed, or curates with stipends.

Mr. Mansfield, and Mr. Fonblanque, for the Report.—The cases relied upon are very obscure; and the construction, which they go to establish, confining the words to Michaelmas next, is extraordinary; for, upon the words of the Statute, it is impossible to doubt the lease would be void. The inference is the other [555] way. *Watson* (*d*) refers to Lord *Hobart's* reasoning (*e*) upon the policy of the Statute. With respect to *Degge's Parson's Counsellor*, suppose a deacon, who cannot have a benefice: is not he within the Statute? Could this agreement be enforced against the clergyman contrary to the Act? If it was not binding upon him, it is not upon the other. With regard to smuggled goods, though there is not such strong prohibitory language as this Statute contains, the Courts say, they will not hear of any contract against the law. The law knows no such thing as an assignment of an agreement. The power is to assign the premises: that is, those he has by law.

The Attorney-General, in Reply.—Suppose an assignment of a lease: that would not be within the Act; for the penalty must be recovered against the spiritual person himself. Under the cir-

(*a*) 3 *Leon.* 122. (*b*) 1 *Leon.* 306.
(*a*) p. 554. *Dy.* 26. (*b*) 140. (*c*) In the Court of Exchequer.
(*d*) *Wats. Clerg. Law.* 361. (*e*) *Hob.* 157. *Colt* v. *Glover.*

cumstances, executing this agreement would put *Wray* in possession, not *Gooch;* and therefore would not be against the Act; and his covenant is not to occupy.

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The Lord CHANCELLOR. The Master has not found that this was a lease immediately assigned to another person. This case is new in its circumstances, and in some degree very difficult; for unless I can make out, that this is a legal agreement, and the lease, if executed, would be good, and also that the lessee would not be liable to the penalty, I do not see how I can help you. This estate was sold with the possession represented to be vacant; and that might be made good, supposing there was a tenant at will, or from year to year. The objection is founded upon an agreement for a lease, not invalid from incapacity to grant, nor upon any objection from the imbecility of the party to contract; but upon the ground, that the legislature has upon reasons of policy passed this Act. The purchaser, liking his bargain, desires this [556] Court to consider the agreement, and the lease under it, as good, and to make him compensation. This Court is not at liberty to say either is good, unless the law has said so. If they are avoided by the legislature, acting upon grounds of policy, this Court cannot be called upon to make such an arrangement at the instance of either party: to secure the enjoyment as effectually as if they were good; which is the necessary effect of compensation given by this Court. There can be no right to call upon the Court so to administer the law as to defeat an Act of Parliament. If on the other hand it is not void, but a penalty of 10*l.* a month is incurred, it is very difficult to give compensation upon that; for though the penalty might be recovered by any one, yet, as it is made the means of preventing the thing from taking place at all, I doubt, whether a Court of equity can take notice of it, even to the effect we are considering. It is a different thing to say, it is good, first, upon the cases, secondly, as not taken for the purpose of personal farming by the lessee. Though I admit, I am much struck with the obscurity and the doctrine of those cases, it is too much for me upon such a point of law, with those decided cases, and upon a subject of so much intricacy, to say, they are all wrong, without the assistance of a Court of law. The last way in which it was put, is very important; for it is a very serious question, whether a clergyman buying a lease, as property, or taking it by devolution of law, as next of kin for instance, or in any other way as a purchase, and not for the purpose of farming and occupying the land, but as property, to be managed with regard to him exactly as if a fee simple estate descended upon him, is to be considered liable to the penalty, or the lease as void under the Act. The only difficulty therefore is as to the assignment to *Wray;* for if the case * could be neatly stated thus, that he was a beneficed clergyman, and a lease was made to him in [*557] the terms of the agreement, and he assigned, not under-leased, and the question was, whether that lease was void, or whether he was liable to the penalties during the possession of the assignee, and a Court of law would say, it was not void, and the lessee was

Whether a clergyman buying a lease, as property, or taking it by devolution of law, as next of kin, &c. is within the Statute 21 *Henry* VIII. c. 13, *Query.*

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not liable to the penalties, I think, the purchaser would be entitled to compensation. But, if it is bad, or by the occupation tainted, as against the policy of the Act, no suitor is entitled to complain, that a Court of equity will not make an arrangement to defeat the intention of the Act. I shall reserve the question, whether it is possible to raise such a case, upon the points, whether the lease is void; whether *Gooch* during his possession was liable to the penalties; and whether he was liable to the penalties during the possession of his assignee. I admit, if he took it for his own personal occupation and farming, the agreement is bad; and it is very questionable, even if he took it having an intention not to occupy it; and if he took possession, that would be evidence of his intention to occupy; and a subsequent change of intention would not make it good.

August 12*th*.

The Lord CHANCELLOR. The best judgment I can make upon this case is, that the lease was taken by *Gooch* for the purpose of occupation; and therefore was void; and the purchaser consequently is not entitled to any allowance for it.

Exception overruled.

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August 11*th*, 12*th*.

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The effect of revocation in equity produced by an agreement for partition, in such a manner as to deprive the testatrix in equity of any interest in the estate devised; and the devisee disappointed has no right to compensation from the heir.

The agreement good to this effect, though it cannot be precisely executed; admitting compensation: Whether if abandoned, the will is set up again; *Query*.

THE decree pronounced by Lord *Rosslyn* in this cause (*a*) declared, that the agreement ought to be specifically performed; and directed an inquiry to ascertain the value of the estates in the counties of *Berks*, *Lincoln*, and *Oxford;* and ordered, that, if the *Berkshire* estate is of less value than the *Lincolnshire* estate, the *Oxfordshire* estate, or so much thereof as will be necessary to make the *Berkshire* estate equal with the *Lincolnshire*, shall be allotted to the plaintiff; and for that purpose a commission was directed to allot and set out the same. It was declared, that the devise of the *Berkshire* estate to the defendants, the *Martins*, was revoked by the agreement; that *Thomas Martin* and all proper parties should join in conveying the same to the plaintiff and his heirs. An account was directed of the rents and profits of the *Berkshire* estate come to the hands of *Thomas Martin:* the balance to be paid to the plaintiff, deducting the costs of the *Martins:* the *Martins* and the *Alcocks* to produce all deeds, &c.; and the plaintiff's costs to be paid by the defendant *Joseph Alcock*.

A petition of rehearing was presented by the defendants, the *Martins* and *Longmires*, against so much of this decree as directed the agreement of *November*, 1795, to be specifically performed, and declared the devise of the *Berkshire* estate revoked by

(*a*) Reported, *ante*, vol. v. 648.

the agreement; complaining, also, that by the decree, effect is given to the claim of the plaintiff to be heir at law of *Mrs. Prankard;* though no evidence was adduced in the cause upon that point.

[* 559] * *Mr. Richards*, *Mr. Stanley*, *and Mr. Leach*, *in support of the Petition.*—At the date of this agreement, the plaintiff was aware of the conveyance to *Alcock*, and his possession under it. The agreement was perfectly inefficient. It could not have any operation. At law, there was no revocation. *Mrs. Prankard* had nothing in the *Lincolnshire* and *Oxfordshire* estates, the subject of the agreement; and the plaintiff, it is proved, knew that she could not then become a trustee for him. All he could be entitled to would be a partition between him and those claiming her moiety. A mere partition between two coparceners, whether by writ or commission, will not revoke a will: *Luther* v. *Kidby.* (a) Partition is inseparably incident to the estate; which is, perhaps, the most satisfactory reason. The parties are in of the same estate; and their interests are the same. A recovery, though for the purpose of confirming the will, is a revocation; as by a fiction of law the devisor takes a new estate. This is only an engagement between these parties, to do that without the aid of the law, which, if done by the law, would not be a revocation. There was no intention to revoke. It is not clear, that a mere agreement for an exchange revokes a will. Whether an actual exchange does, has been a considerable time a question: but if it has that effect, it must be upon the principle that there is a different estate. The circumstance, that these estates are in different counties, makes no difference as to the intention; and forms no objection to the partition. Though the sheriff cannot go into another county, commissioners may; and may give a farm in one county to one, in another to the other: but a partition in this Court cannot have more effect to revoke a will than a partition at law. That upon [560] a partition, the parties may take respectively in different counties, and that it is not necessary there should be an actual partition of each tenement, is proved by many authorities, in *Viner* (a) and Lord *Coke;* (b) and the same rule prevails in equity: *The Earl of Clarendon* v. *Hornby.* (c)

With respect to the conveyance to *Alcock*, the argument was, that it was void, not as being voluntary, but as fraudulent; purporting upon the face of it to be upon consideration; and by the evidence appearing to have been without consideration. The Court therefore considered him entitled, not under the conveyance; but solely by the will; proceeding upon the principle, that under those cicumstances the conveyance was void, not only against others, but against the grantor herself. Assuming, then, that she was complete owner, this is a mere agreement for a partition; and therefore no revocation.

(a) 8 *Vin.* 148. *Pl.* 30. 3 *P. Will.* 170, *note.*
Upon the Law of Revocation, see *Harmood* v. *Oglander*, *ante*, vol. vi. 199. *Post.* and the references in the note *ante*, vol. vi. 201.

(a) p. 560 16 *Vin.* 231. (b) *Co. Lit.* 169. (a) (c) 1 *P. Will.* 446.

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The plaintiff, claiming as heir, must prove himself heir. That point was insisted on: but no evidence was produced.

Mr. Mansfield, and Mr. Hart, in support of the Decree.—By this agreement, the whole of the *Berkshire* estate is given to the plaintiff. Then there is an end of the devise of it. What can the devisee take under the will? The estate is withdrawn. Exchanging it is just the same as selling it; and in this Court there is no difference, whether it is by agreement or actual conveyance. In the instance of a sale or exchange, it is not, properly speaking,
[561] revocation: but the estate is taken away: it is no longer the estate of the devisor. The subject is gone; and there is nothing upon which the will can operate. A partition does not revoke the will, where the devisee is one person: but it may operate as a revocation or ademption; as if a person seised as a coparcener of an estate in *Surrey*, and another in *Middlesex*, devises all his undivided moiety of the estate in *Surrey* to *A.* and of that in *Middlesex* to *B.*; and afterwards agrees to relinquish his interest in the *Surrey* estate, and to take the entirety of that in *Middlesex:* the partition, so far as it does not disturb his interest in the *Middlesex* estate, is no revocation: and the devise will take effect so far: but as to the *Surrey* estate, it is gone; and the additional interest acquired in *Middlesex*, not being devised, goes to the heir. This is that case precisely. The intention alluded to, upon the question of revocation, as is stated in *Hick* v. *Mors*, (*a*) is not an intention to revoke, but to have the estate in a different manner.

The plaintiff does not claim the *Berkshire* estate as heir at law, but only as party to this agreement; by which the testatrix bound herself to convey; merely desiring to have the effect of his contract. *Alcock*, submitting to the decree, does not put it to the plaintiff to question which of his titles is good.

Mr. Richards, in Reply.—Though *Alcock* does not complain of this decree, these parties are entitled to complain of a decision, affecting their interests through an agreement respecting property which did not belong to either of the parties. Such an agreement cannot be executed: it cannot have any effect; and therefore can-
[562] not be a revocation of a will. The parties themselves must have considered it of no avail. No steps were taken by the plaintiff to have it carried into execution. The testatrix did not mean to take from these devisees the benefits she had given them; and would not have left them in the situation in which this decree has placed them. The plaintiff not having proceeded to enforce the execution of the agreement during her life, what right has he now to do so? He must be considered as having abandoned it; even supposing it upon a subject she could bind.

The plaintiff claims not only under the agreement, but also as heir at law; and the decree is open to objection in many shapes, if he is not heir. How can there be a division of all the interest of the testatrix, without some one representing all her interest? The devisees of the *Berkshire* estate have a right to insist, that the heir shall indemnify them against the loss of that estate. He

(*a*) Amb. 215.

ought to be before the Court, to sustain his right to what does not pass to *Alcock;* out of which the devisees are entitled to compensation. 1802. KNOLLYS v. ALCOCK.

The Lord CHANCELLOR. This struck me as a singular decree; though it is appealed from only as to one point. The bill is filed by this plaintiff in two characters; for so the allegations of the bill certainly represent him: 1st, as being under the agreement entitled to the whole *Berkshire* estate, and therefore the *Martins* being by the agreement deprived of all, that was devised to them; containing also a vast number of allegations as to *Alcock;* that the conveyance to him was void; that he was sufficiently paid, &c.; and dealing with him in part, as if he could claim, not under the deed, but under the will only: but still, whatever was his right, dealing with him; 2dly, as entitled in the character of heir at law. It is very clear, from the report, Lord *Rosslyn's* notion was, that *Alcock's* claim was under the will. At the same time, the decree has no judicial declaration, whether he is entitled under the deed or the will. In some way or other, the decree does consider him entitled: but judicially it declares nothing as to his title either by the deed or the will. The decree even makes him pay the costs; and yet it is not at all complained of by him.

The question upon this petition of rehearing is simply as to the interest of the *Martins.* I had a strong prejudice in my mind originally, that the plaintiff ought to have proved himself heir: but upon consideration, I have adopted the notion, that as against them it was not necessary to prove it; for he raises only this question of revocation in equity by the agreement as against them; propounding that question, not as heir, but as claiming under the agreement. If there is no relation of heirship at all, that question he would have as distinct a right to raise with them, as if it was admitted that he was heir. To get rid of this, it was put very ingeniously, and I admit in general cases, if a question of worth and value is to be agitated, and the Court feel it to be their duty to have that discussed, they will not decide upon it without every one sustaining any character, the rights resulting out of which can be affected by the decision, being a party; and if the question was of such value as to require the heir to be before the Court for the discussion, I admit, the record does not furnish a right to assert, that he is before the Court; for I should not have thought myself bound by their agreeing as joint heirs, if it turned out that they were mistaken as to that; and either party might have had an interest to reform that error, in subsequent transactions. But the question being so raised, I am not called upon as a Judge to require him to prove himself heir at the instance of the *Martins;* for in that view of the question, we must take the agreement in [564] equity to be a revocation: if it is, there is no equity upon the part of the devisees disappointed by the revocation to call upon the heir, who takes, to compensate to those devisees so disappointed by the revocation of the will. There is nothing in the will leading to that, or resulting out of the character of the heir; and there is not a *scintilla* in any of the transactions, upon which to ground

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such an equity. Therefore the argument, though ingenious, is not solid, which requires me to say, the plaintiff has not done enough upon this agreement to entitle him to a decision as to the *Martins*.

The question then is reduced to this; whether in equity this agreement is a revocation; and it is admitted, that if it was good and practicable when entered into, and it remained either altogether practicable, or so far practicable, that equity would for the plaintiff carry it into effect, either wholly, or by an arrangement, it will amount to a revocation, unless upon the doctrine as to partition. As to that, it is settled, that if a partition is effected either by compulsion or agreement, and the thing done is nothing more than partition, it is not a revocation. The slightest addition to that purpose will make it, not as a partition, but on account of that slight addition, a revocation; and if parties will even introduce a power of appointment, prior to the limitation of the uses, that very slight circumstance, as it certainly would be considered if it was *res integra*, is sufficient. But in every case, in which a conveyance or an agreement to make partition has been held not to work a revocation, the partition did not operate to this extent; that the party, whose will is alleged to be revoked, had no interest left after the partition in the subject of the devise. If, for instance, the parties had nothing but an estate in *Berkshire*, and they agreed to make partition, and she had devised all her estate, or all her estate in *Berkshire*, after the partition that would have been a moiety of the *Berkshire* estate; and it would have passed by the will. But if it is made so, that the words of the devise cannot by possibility amount to a description of the thing, how can it not be a revocation? This testatrix at her death has no *Berkshire* estate. Are the devisees to take an equivalent from the *Lincolnshire* and *Oxfordshire* estates, out of both, or which, or all of either? Suppose, instead of a partition, by which all the estate in one county was given to one, and all in the other to others, as in this instance, she had given part of the *Berkshire* estate only to the *Martins*, *viz.* tenements in a particular village, and at her death she had no estate in *Berkshire;* the will could not operate upon other tenements in *Lincolnshire* and *Oxfordshire*. It seems, therefore, that, taking it to be matter of partition, yet if the manner of it destroys the interest of the testator in the thing given, so that at his death there is no interest in him to answer the description, the devise cannot operate; as it cannot operate upon the thing given; and in a hundred cases, you cannot say, upon what other subject it is to operate.

Mere partition, whether by compulsion or agreement, is not a revocation of a will: but the slightest addition, as a power of appointment, prior to the limitation of the uses, is sufficient.

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But it is said, an agreement in equity is a revocation, only, where it can be performed, and was not abandoned. As to the former, I do not admit, that it will not be an agreement in equity, because it cannot be in *ipsissimis terminis* performed. There might be differences arising out of circumstances, that will leave this Court in full power to execute it; dealing with part, and compensating for that which cannot be strictly dealt with. Upon that principle, how does this stand? They deal together, as if they were joint heirs. It is not effectual, then, to say, the plaintiff knew

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of the transaction with *Alcock*; for if so, still she must be taken to represent, that she knew how to deal with him: and if both were apprized that *[* 566] *Alcock* meant to claim against them both, still that is no obstacle to the plaintiff's coming against her for the *Berkshire* estate; desiring compensation for what she cannot give according to the agreement. Therefore, if the deed was expressly declared good, that would not have afforded a sufficient obstacle to the agreement as to the *Berkshire* estate; if he chose to have a specific execution as to that. Then as to the abandonment, I do not admit, that if there is an agreement in equity, which at the moment is a completely operative revocation, a subsequent abandonment will of necessity set up the will. I do not say, whether it would be so, or not; for I am of opinion, I cannot raise the question upon the fact. If he will have a right to a specific execution as to the *Berkshire* estate, he never abandoned that, nor a right stated in larger terms.

The necessary conclusion is, that the agreement was made in a manner, taking from the testatrix every interest in the estate she described in her will. She had no interest at her death in that estate, and these defendants are not founded in saying, her will in law or in equity has passed to them any interest in any other estate; and if not, I cannot say, that, because the will is disappointed by her own act as to the only estate devised, therefore they are entitled to take something which it is difficult to describe, some estate not expressed to be intended. The heir has all the benefit of absence of intention; and that can never give these defendants a right. Therefore, looking at this decree altogether, I cannot think it has miscarried upon this point.

Decree affirmed.

MAUNDRELL v. MAUNDRELL. [567]

The MASTER *of the* ROLLS *for the Lord* CHANCELLOR.

March 23d.
August 12th.

A purchaser cannot protect himself against a claim of dower by a term attendant upon the inheritance, unless he has procured an assignment. (1)

Husband having a power of appointment, paramount the right to dower, in default thereof to himself for life, remainder to his right heirs, if the power could have effect, yet a purchaser taking by a conveyance adapted to pass the interest in the estate, as a limitation of the fee was held to take in that way, not by way of appointment, and therefore subject to dower.

BY the decree made in this cause, an inquiry was directed, as to the right of the plaintiff, *Sarah Maundrell*, to dower.

The report stated indentures of lease and release, dated the 18th and 19th of *May*, 1756, being the marriage settlement of *Thomas* and *Thomasin Maundrell*; under which their eldest son, *Robert Maundrell*, being tenant in tail male of the settled estates in the county of *Wilts*, subject to a term in trust for raising portions, suffered a recovery to the use of his father for life; remain-

{(1) See the note to *Wynn* v. *Williams*, *ante*, vol. v. p. 130.}

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By deed poll, dated the 1st of *January*, 1790, *Thomas Maundrell* the father directed the trustee to raise the portions; and by another deed, dated the 25th of *March*, 1790, he surrendered the estates to his son, his heirs, &c.; and *Robert Maundrell* covenanted to pay the portions to the other children.

By indentures of lease and release, dated the 30th and 31st of *March*, 1791, *Robert Maundrell* conveyed the settled estates, among others, to *James Read* and *Thomas Marsh Hughes*, their heirs and assigns, to the use of such person and persons, and for such estate and estates, and for any term and terms of years, and chargeable with any sum or sums of money, and upon such trusts and for such purposes, and subject to such powers of revocation or declaration of uses, and such provisoes and agreements, and in such other manner and form, as *Robert Maundrell* during his
[568] life should by deed or will appoint; and in default thereof, to the use of *Robert Maundrell* for life; and from and after his decease, to the use of the right heirs of *Robert Maundrell*.

By articles, before and in contemplation of the marriage between *Robert Maundrell* and the plaintiff *Sarah Maundrell*, dated the 15th of *April*, 1791, *Robert Maundrell* covenanted to pay to trustees, within six months after the marriage, 2000*l.*: upon trust to pay the interest thereof, after his death, to *Sarah Maundrell* for her life; and after her death, in trust for her children: but there was not any clause expressly, or by legal inference excluding her from dower. The marriage took place on the 18th of *April*, 1791.

By indentures of lease and release, dated the 19th and 20th of *February*, 1795, reciting the settlement and other deeds before mentioned, and that *Robert Maundrell* was seised in fee of estates in the county of *Wilts*, not comprised in the settlement, *Robert Maundrell*, in consideration of 7545*l.* 18*s.* paid, and of the covenant of *Henry Maundrell* for the payment of 4000*l.* 2000*l.* and 2000*l.* conveyed the settled and unsettled estates in the county of *Wilts* to *Henry Maundrell* and *William James Wray*, their heirs and assigns, to the use of trustees for 4000 years; upon trust to raise 4000*l.* for portions under the trusts of a term of 500 years, also the sum of 2000*l.* and interest, due to *John Tyler* upon a mortgage to him by *Robert Maundrell*, dated the 1st of *January*, 1791, for a term of 2000 years, and the 2000*l.* under the marriage settlement of *Robert Maundrell;* and subject thereto to the use of *Henry Maundrell* and *Wray*, and the heirs and assigns of *Wray* for ever; in trust, as to the estate of *Wray*, for *Henry Maundrell*, his heirs and assigns, for ever.

[569] *Henry Maundrell* entered under this conveyance.

The Master stated, that it appearing to him, that the term of 2000 years, created by the deeds of *January*, 1791, for securing 2000*l.* and interest to *Tyler*, is now outstanding and unsatisfied, and that *Henry Maundrell* is a fair purchaser for valuable consideration, he was of opinion, that the plaintiff as against him is not entitled to dower either at law or in equity.

As to the other estates, comprised in the settlement of 1756, wherein *Robert Maundrell* was entitled to an absolute estate in fee simple, (subject to the mortgages and encumbrances after mentioned) the report stated, that by an indenture, dated the 7th of *January*, 1758, and a fine levied by *Thomas Maundrell*, and *Thomasin*, his wife, tenant in tail, the estate was limited to such uses as they should jointly by deed appoint; and, in default of such appointment, to the use of *Thomas Maundrell* for life; remainder to the use of *Thomasin* for life; remainder to the use of such person as she should by deed or will appoint; and for want of appointment, to her right heirs for ever; and by indentures, dated the 22d of *August*, 1758, in consideration of 2700*l.* they appointed and demised to *Abraham Poore*, for 1000 years, subject to redemption. That sum was afterwards paid off; and by indentures, dated the 24th of *April*, 1760, part of the lands comprised in the mortgage was assigned to *William Ruddle* for the remainder of the term, subject to redemption or payment of 700*l.*; and by a deed, dated the 25th of *April*, 1760, the residue of the lands was assigned to *John Gaby*, his executors, &c. for the remainder of the term; in trust for the use of such person and persons as *Thomas* and *Thomasin Maundrell* should during their joint lives by deed appoint; and in default thereof, to the use of *Thomas Maundrell* for so many years of the term as he should live; with remainder in trust for the use of *Thomasin Maundrell*, for so many years of the term as should run out in her life; and after the death of the survivor, in trust for such person as *Thomasin* should by deed or will appoint; in default thereof, to the use of the person or persons to whom the inheritance should belong, and his, her, and their, heirs; to the intent, that the remainder of the same should attend the inheritance of the said premises. [570]

By indentures of lease and release, dated the 13th and 14th of *October*, 1760, *Thomas* and *Thomasin Maundrell*, in consideration of 1000*l.* conveyed great part of the lands, comprised in the deed of the 25th of *April*, 1760, to *Seymour Wroughton*, his heirs and assigns, subject to redemption on payment of 1000*l.* and interest; and upon the 14th of *October*, 1760, the residue of the 1000 years' term, vested in *Gaby* as to the same premises, was assigned to *William Salmon*, in trust for *Wroughton*, for the better securing the said 1000*l.* and interest. By indentures, dated the 6th of *August*, 1777, the representatives of *Ruddle* assigned the hereditaments, comprised in the deed of the 24th of *April*, 1760, to *Wroughton*, for the residue of the term of 1000 years, as a further security for 2000*l.* and interest then due to him.

The report further stated, that the last mentioned hereditaments were comprised in the first mentioned settlement. *Robert Maundrell* paid *Wroughton* 2000*l.* and interest: but no conveyance or assignment of the estates vested in him was made at the time of such payment. By indentures, dated the 30th and 31st of *May*, 1793, in consideration of the principal and interest paid to *Wroughton* in his life, and of 5*s.* to Lord *Wenman*, his heir at law, Lord *Wenman* released, and *Thomas Maundrell*, in consideration of

1802. MAUNDRELL v. MAUNDRELL. natural love and affection, granted, ratified, and conveyed, to *Robert Maundrell*, all the premises comprised in the indentures of the 13th and * 14th of *October*, 1760; to hold unto and to the use of *Robert Maundrell*, his heirs and assigns. By the said deed of the 31st of *May*, 1793, the personal representative of *Wroughton* assigned the hereditaments, comprised in the deed of the 24th of *April*, 1760, to *William Hughes* for the residue of the said term, in trust for *Robert Maundrell*, his heirs and assigns, and to attend the inheritance; and by the indentures, dated the 31st of *May*, 1793, it was declared, that the personal representative of *William Salmon* should stand possessed of the premises assigned to him for the residue of the 1000 years in trust for *Robert Maundrell*, his heirs and assigns, and to attend the inheritance; by which conveyances of the 30th of *May*, and the 30th and 31st of *May*, 1793, it appeared, that *Robert Maundrell* became seised of the legal estate in fee of all the estates not comprised in the first mentioned settlement, subject to the said term of 1000 years. *Robert Maundrell*, by the indentures of the 19th and 20th of *February*, 1795, conveyed all the aforesaid estates, not comprised in the first mentioned settlement, and of which he was seised in fee.

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The Master found, therefore, that *Robert Maundrell* was seised, during coverture, of the legal estate, or inheritance of the estate not comprised in the settlement: but it appearing to him, that the said term of 1000 years, though satisfied, was assigned in manner aforesaid, expressly in trust to attend the inheritance, and which inheritance was afterwards purchased by and conveyed to *Henry Maundrell*, in manner aforesaid, he was of opinion, the plaintiff was not entitled to dower out of the last mentioned estate, and therefore not out of any estate, of which *Robert Maundrell* was seised during the coverture.

[572] An exception was taken by *Sarah Maundrell* to the report.

Mr. Alexander, in support of the Exception.—The cases of *Lady Radnor* v. *Vandebendy*, (a) *Swannock* v. *Lifford*, (b) and *Willoughby* v. *Willoughby*, (c) contain the whole law upon the subject; and Lord *Hardwicke* expressly states, that an assignment of the term always made part of the condition; and the same doctrine is laid down by the late *Master of the Rolls*; that the purchaser should use diligence to get in the term. The way in which the widow puts her right, is, that the trustee is trustee for the wife in respect of her dower, just as much as for the inheritance of the husband, being trustee for all the interests. This purchaser shows, he relied upon the covenant of the husband merely, not as a collateral security only, as in *Swannock* v. *Lifford*; for otherwise he would have got an assignment of the term. The danger of shaking titles, by adopting the distinction pointed out by Lord *Hardwicke*, does not apply, from the invariable practice to have an assignment from the trustee, or a declaration by him. That is universally understood to be necessary, to give the

(a) *Show*, P. C. 69 *Pre. Ch.* 65.
(b) See *Mr. Butler's* note to *Co. Lit.* 208.; *a.* Note, 105.; *Amb.* 6.; 2 *Atk* 208, by the name of *Hill* v *Adams*.
(c) 1 *Term Rep.* 763.

purchaser the protection of the term; and, if that is not done, the trustee remains trustee for the inheritance, as it stood previously to the purchase, *viz.* for all persons having interests, and for the purchaser, as far as he has acquired an interest. In the case of dower, notice is immaterial. In any other case, as a puisne encumbrancer getting in a term in order to squeeze out a prior encumbrancer, notice makes a difference. That is the only difference; and it never was suggested, that the puisne encumbrancer can have the advantage of a term without getting it in. This purchaser not having taken an assignment of the term, the trustee is trustee for the widow. Lord *Hardwicke* said, he would not go beyond *Lady Radnor* v. *Vandebendy;* and this would be going beyond it.

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Mr. Romilly, and Mr. Cooke, for the Purchaser, in support of the Report.—This case has never been decided: but the principle is fully established in the cases of *Lady Radnor* v. *Vandebendy*, and *Swannock* v. *Lifford.* Lord *Hardwicke* could not mean, that the widow should be barred only in a case exactly similar in circumstances to *Lady Radnor* v. *Vandebendy;* for *Swannock* v. *Lifford* was under circumstances totally different. Lord *Hardwicke* meant only, that he would not carry the principles further. In this instance, your Lordship is not desired to carry the principles further. This is exactly within the principles of *Lady Radnor* v. *Vandebendy.* The only question is, whether taking an assignment to a trustee for the purchaser makes any difference. It cannot make the least difference. According to the express terms of the trust, the trustee is trustee for the purpose to attend the inheritance: for all persons interested: a trustee, then, for the purchaser, taking the estate. What difference would an assignment to another trustee make, which must be in precisely the same terms? The argument, that this trustee is trustee for the widow, assumes the whole question. He is not so according to the terms of the trust, clearly; but merely as a Court of Equity would remove that term for her benefit. It certainly is frequent to have an assignment upon a purchase. It is more convenient to the purchaser to have a trustee, with whom he is acquainted, than to have the term outstanding in a stranger. That is the reason of the practice for a purchaser to take an assignment in trust for himself by name. But this is a purchase by a near relation; in which case it is very unusual; especially where the transaction was of so recent a date. It may be usual, where the term is in a stranger, an old man; whose personal representative may be uncertain. But what alteration does it make? Is not the assignee as much entitled to be protected under that trust, as if it was taken for him by name? It is true, Lord *Hardwicke* talks of the term being assigned. It happened to be assigned in that instance: but the meaning was, the term being kept alive, not merged. Lord *Hardwicke* speaks of the term being assigned, as well in the case of a mortgage as of a satisfied term. Suppose the purchaser paid off the mortgage, but did not take an assignment; would it be said, as no act was done to show he meant to have the benefit

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of the mortgage, he did not mean to have the benefit of it as a purchaser, to prevent the widow's redeeming? There are some passages thrown out in Lord *Hardwicke's* argument, that tend to countenance that doctrine: but it is very difficult to know the principle of it. It may be considered, that by paying off the mortgage, the nature of the estate is altered. The real distinction is that of the purchaser and the heir at law of the husband. This purchaser was entitled to call upon the trustee at any time.

There is another ground, independent of the term, upon the deed of 1791, executed before the marriage, to such uses as *Robert Maundrell* should appoint: and, in default of appointment, to him for life; and after his decease to his right heirs; in effect to him in fee. He executes the power after the marriage, by conveying the estate to *Henry Maundrell;* and the question is, whether all the intermediate estates are not determined, as if they never had existed; and whether *Henry Maundrell* did not take an estate in fee; so that the husband never took an estate upon

[575] which dower would attach. The sole object of this deed was to prevent dower. The moment he executed the appointment, a new use sprung up in the appointee; who took, not under the appointment, but under the original deed, in 1791, previous to the marriage, and therefore paramount to the right of dower. There is no case upon this point: these means of preventing dower by giving a power of appointment to the husband being of very modern invention: but these are the principles upon which that practice has been established.

Mr. Alexander, in Reply.—Upon the last point the cases referred to are, where the husband has no sole legal estate: but under the limitations of the deed of 1791, the trustees have no estate until some appointment. Those cases, therefore, have no resemblance.

Upon the other point, in this particular case, where there is an outstanding term, this Court constantly aids the dowress, and even against a purchaser. All these cases proceed principally upon this ground; that a great number of titles depend upon this understanding in the profession, that, if the purchaser takes an assignment of the term, he is safe; and, in order not to disturb that, the Court has in those instances decided against the dowress. The ground is, that the purchaser has used due diligence; a ground that does not exist in this case: this purchaser relying on the covenant of the husband. When the reliance is placed on the outstanding term, the practice is to get it in. There is no distinction between this and the case of the mortgage stated by Lord *Hardwicke.* It is assuming the question to say, this purchaser might have called for this term. It may as well be said, he might in the case of the mortgage. The Court must decide who has the better right to call for it. They have the right between them.

[576] The trust is to protect the inheritance, as it stood in *Henry Maundrell*, against all strangers. When he takes it to protect the inheritance, he takes it to protect all interests, which these persons take under him, in whatever way that interest arises.

The MASTER *of the* ROLLS. I certainly should not have discovered any solid distinction between this case and *Lady Radnor* v. *Vandebendy;* and it is difficult to comprehend the distinction stated. It is admitted, that, if the purchaser had taken an assignment to a trustee, he would have been completely protected against dower. It is difficult, however, for me at least, to find a solid distinction between doing that and letting the term remain in the name of the original trustee; for, as it stands at present, it is to *A.* upon trust for *B.* his heirs and assigns, and to attend the inheritance. Then what is the distinction between taking for the benefit of the heirs and assigns by the general description, and taking it for the benefit of the heir and assign by name, substituted for the description? It would be only a change of the person, and a detailed description of the person instead of the general one; and yet Lord *Hardwicke* does in that decision, constantly introduce it as a term in every proposition he states, that the purchaser has taken an assignment of the term to a trustee of his own; which he always supposes to be that, which gives the protection to the purchaser against the claim of dower. I wish therefore to have the opportunity of maturely considering that case, for it is not to be supposed, that Lord *Hardwicke* should so guardedly express himself, whenever he mentions the protection of the purchaser, unless there was some ground for it.

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August 12th.

The MASTER *of the* ROLLS. The principal question is, whether a purchaser can protect himself against a claim of dower by a term attendant upon the inheritance, of which he has not procured an assignment. The report states a particular assignment of a satisfied mortgage term to a trustee for the husband, and to attend the inheritance. At the hearing I was inclined to concur in the opinion of the Master: but upon consideration of the doctrine relative to the nature of terms attendant upon the inheritance, and their effect in barring dower, I am satisfied, that, without an assignment to a trustee for the purchaser, the term does not exclude that claim. At law all terms are considered as terms in gross; and therefore every existing term, without regard to the purpose for which it was created, prevents a dowress from having any legal benefit from her recovery in dower: for she recovers with stay of execution during the term. But equity regards the purpose for which the term is created and subsists; and if it is only for the benefit of the owner of the inheritance, it is considered part of the inheritance, not indeed absolutely merged, but so attendant upon it, as to follow and accompany it, and every

At law all terms are considered as terms in gross; and therefore without regard to the purpose prevent a dowress from any legal benefit from recovery in dower; for she recovers with stay of execution during the term. But equity regards the purpose, for which the term is created and subsists; and if only for the benefit of the owner of the inheritance, it is considered part of the inheritance: not absolutely merged, but so attendant as to accompany it, and every right and interest growing out of it by operation of law or agreement. Not to be used therefore against the owner of the whole or any part of the inheritance: every description of ownership having a use in the term commensurate with the interest in the inheritance. When dower arises, therefore, the term in a proportion is as much attendant upon that interest as during the husband's life upon the inheritance; and protects against either heir or purchaser.

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[* 578]

When the husband conveys to a purchaser, and the wife does not by fine join, nothing passes but the estate the husband had; that is, an estate subject to dower. The right to dower remains just where it was. The purchaser stands precisely in the place of the husband. The outstanding term will accompany the inheritance thus conveyed, in the mode and manner in which it was attendant upon the same inheritance, before it was conveyed. The term being a mere accessary, the operation of the conveyance upon it is purely derivative and consequential. It is impossible that a greater interest can be incidentally acquired under the term than directly in the freehold.

But, it is said, this is not consistent with the case of *Lady Radnor* v. *Vandebendy*. It was not necessary in that case to decide
[579] any thing inconsistent with these principles which I have laid down; and, according to the best information we have as to the grounds of that decision, nothing inconsistent with these principles was intended to be decided. It was not necessary to decide against them; for my proposition relates to a term left to remain, as it was before, generally attendant upon the inheritance; not a term, of which the purchaser, or subsequent encumbrancer, has obtained an assignment. In that case the purchaser had used the precaution of taking an assignment for the protection of his purchase; and then, notwithstanding that circumstance, great doubt was entertained upon the question. It is to be inferred, therefore, that the general principle was considered established. Even against such a purchaser the first decree was in favour of the dowress. That was reversed upon a rehearing; but there was a great inclination in the *House of Lords* to reverse that reversal. This circumstance, as well as the particular ground of the affirmance of the decree, is stated by Lord *Hardwicke* in *Swannock* v. *Lifford*, in the note to *Coke* upon *Littleton*. (a) The danger of shaking titles, by denying effect to an established mode of securing purchasers against claims of dower, seems to have been

(a) Edit. by *Hargrave* and *Butler*, 208; note a, 105.

the only solid foundation for this judgment; for upon principle I do not think it could be supported; as the case of a purchaser taken by itself is nothing. A purchaser, merely as such, has no equity whatsoever against the widow, claiming by title prior to, and both legally and equitably as good as his. The term, if it continued outstanding, is as much attendant, in equity, upon dower, as the remaining interest in the inheritance; and therefore ought not to be set up by the latter against the former. As to the operation of the assignment in protecting subsequent against prior interests, that depends upon the purchaser obtaining it *bonâ fide*, without notice of the interest against which he sets it up. [580] How could the purchaser there be said not to have notice, when he knew Lord *Bodmyn* to be married, and took an indemnity from him against dower? I do not wonder, therefore, that in *Lady Williams* v. *Wray (a)* it was in the first instance successfully contended, that this applied to the interest of the heir, as much as a purchaser. It was argued, as I have stated, that *Vandebendy* had full notice of dower, and got in the term to protect him against the dowress; and therefore, having notice, was to be considered only as a volunteer; and certainly if it was *res integra*, I should think, the dower could not be excluded more in one case than the other. It is evident Lord *Hardwicke* thought so, from what he states in the outset of the judgment in *Swannock* v. *Lifford*, and what he subjoins to his statement of the case of *Lady Radnor* v. *Vandebendy*; that ever since that case it has always been said, that the Court is bound by it; and, on the other hand, he had heard it often said by the Court, that they will go no further. Lord *Hardwicke* then proceeds to show, why he thought he was not going further; but that on the contrary that case was somewhat less favourable to the dower; as the term was not a mere satisfied term, as that in *Lady Radnor* v. *Vandebendy* was in part at least, but a subsisting mortgage term, for which full consideration was paid.

But what are the cases which Lord *Hardwicke* thinks precisely within *Lady Radnor* v. *Vandebendy*, and by which the Court is bound? Those only, in which an assignment is taken by the purchaser either to himself or to a trustee of his own. In *Atkyns (b)* it is stated, that since the case of *Lady Radnor* v. *Vandebendy* it [581] was a settled rule of the Court, that if a purchaser took in a term precedent to the right of dower, whether it was a satisfied term, or money paid for it, it was a bar to the wife's dower: but if the mortgage had subsisted at the husband's death, the wife might have redeemed, and been entitled to her dower; or if the husband had paid off the mortgage, and taken an assignment of the term to attend the inheritance, and died seised, the wife would have been endowed: but if a purchaser came in, after the mortgage was paid off and the death of the husband, and took an assignment of the term, that would prevent dower.

According to *Ambler (a)* Lord *Hardwicke* says, a dowress

(a) 1 *P. Will.* 137. *Pre. Ch.* 151. (b) 2 *Atk.* 209.
(a) p. 581: *Amb.* 7.

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may redeem a term against a mortgagee, and remove it out of the way against an heir; but cannot against a purchaser of the inheritance, who has taken an assignment of the term to protect his title. In the full report, in the note to *Co. Lit.* (b) Lord *Hardwicke* never once mentions the effect of the term in protecting a purchaser against dower, but with a qualified condition, that it shall be assigned to a trustee for him. Is it possible to suppose Lord *Hardwicke* would have introduced an irrelevant term? The judgment would not only be inaccurately expressed, but would mislead, if it is true, that the mere existence of the term would answer the purpose as well as the assignment. If we pass by the circumstance of notice, as the judgment in *Lady Radnor* v. *Vandebendy* compels us to do in the particular case of dower, every thing depends upon the assignment. The term, though in most respects incorporated with the inheritance, is not wholly merged. [582] It protects equally the general mass growing out of the inheritance; but is capable of being disannexed, and of protecting particular interests; but that can be done only by assignment.

The whole doctrine upon this subject is discussed by Lord *Hardwicke* in *Willoughby* v. *Willoughby*. (a) Lord *Hardwicke* notices the opinion of some conveyancers, that, where there is a term, of which the trust is already declared to attend the inheritance, it is not necessary to disturb it, and take an assignment to new trustees. Lord *Hardwicke* shows, that is not generally true: but, if there be antecedent encumbrances, nothing but an assignment can protect it; and, that he conceived dower to be such an interest as could be guarded against only by an assignment, I have shown from the whole tenor of the judgment in *Swannock* v. *Lifford*. Therefore the term does not exclude this plaintiff from dower.

Then another question is, whether the plaintiff is not excluded by the form of the conveyance. Before the marriage, the estate was limited to such uses as the husband should by deed or will appoint; and in default of appointment to the use of himself for life; and from and after his decease to the use of his right heirs. The purchaser, it is said, is in by appointment; which supersedes the fee in the husband until and subject to the appointment. First, I doubt whether the purchaser can be said to be in under an appointment. The words and the instrument are as much adapted to pass an interest as to execute a power; (b) and the recital is, not that he has power to appoint, but that he is seised in fee of estates in the county of *Wilts*, not comprised in the settlement.

[583] But, secondly, the power of appointment is merely nugatory, and nothing distinct or different from the fee. The fee was clearly in the husband until appointment. (a) In *Goodill* v. *Brigham* (b) it was held, that a power added to the fee was merely void. So

(b) Edit. by *Hargrave* and *Butler*, 208; note *a*. 105.

(a) 1 *Term. Rep.* 771.

(b) *Cox* v. *Chamberlaine*, *ante*, vol. iv. 631.

(a) p. 583. See *ante*, vol. iv. 636. *Ante*, vol. v. 748, and the notes

(b) 1 *Bos. & Pull.* 192. See *ante*, vol. iv. 637.

the power, in this case, followed by a limitation of the fee, must be absorbed in the fee; which includes every power. The reason commonly given, why a power may have effect, though limited to the owner of the fee, is, that he may appoint in a mode by which his legal fee would not entitle him to convey. I give no opinion upon the sufficiency of that reason. But in this case, it is to such uses as he should by deed or will appoint; that is, by deed or will legally executed; and by those instruments he might have passed the fee, though nothing was said about the appointment. The limitation, therefore, operates purely as a limitation of the fee; and that fee he could only convey subject to her right of dower.

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Limitation to such uses as *A* shall appoint; and in default of appointment, to him in fee: the fee is in him until appointment.

Therefore, I am of opinion, the exception must be allowed.

DETILLIN v. GALE.

August 13th.

THE bill in this cause, among other objects, prayed a redemption and account against the defendant *Sidney;* who, having been employed by the plaintiff as his solicitor and agent, took a bond and judgment and a mortgage for his bill, without any settlement of accounts between them. An inquiry having been directed as to what was due to the defendant upon his securities and otherwise, great delay and expensive litigation were *occasioned by his conduct, before any account could be procured from him; and, finally, his demand was reduced by a great deal more than a sixth. The plaintiff pressed for a general account against him, with rests, and also for costs. For the defendant, it was insisted, that there was no instance of making a mortgagee pay costs, and that in that character he was entitled to his costs.

Mortgagee, though entitled to costs in general, deprived of costs occasioned by improper conduct; and even compelled to pay costs. (1)

[* 584]

Mr. Richards, and Mr. Hall, for the Plaintiff: Mr. Piggott, and Mr. Fonblanque, for the Defendant.

The Lord CHANCELLOR. Upon the transactions and circumstances of this case, a bill might have been filed, that would have called for the decree now prayed: the defendant, standing in the character of attorney and solicitor, and general manager, converting the debt from his client into a mortgage and judgment, when the accounts were unsettled and the balance might be doubtful. A bill producing that state of circumstances, and alleging that it was against the duty of the defendant, in his character of agent, to take a security carrying interest, instead of discharging the demand by the money of his employer, as received by him, might have been filed, to have a decree for a general account, without regard to the security; and that in that account, interest should not be allowed on one side, and not upon the other. The first obligation upon the defendant, standing in that relation to the

Bill for a general account lies against a solicitor and agent, taking a security without a settlement of accounts.

{(1) See *Hine* v. *Handy*, 1 Johns. Cha. Rep. 6.}

1802. Dettillin v. Gall.

plaintiff, is, a duty upon his part perfectly easy, that his accounts ought to have been quite clear. The conclusion, upon his answer to this bill for an account, that his accounts would not be ready for six weeks, is, that he had not done his duty.

It is said, because he is a mortgagee, he is to have his costs. That is not of necessity. *Primâ facie* he is to have them certainly. [585] The owner coming to deliver the estate from that encumbrance he himself put upon it, the person having that pledge is not to be put to expense with regard to that; and so long as he acts reasonably as mortgagee, to that extent he ought to be indemnified. But that principle does not go to such a case as this: the solicitor an encumbrancer with regard to law expenses, taking a bond and judgment for his bill. The expense of the suit as to that is not incurred by the mortgagor, in delivering his estate from a demand admitted to be just: on the contrary, the great expense of the suit is incurred in a successful endeavour of the mortgagor to prove, what he has established, that the defendant charged him with a great deal more than he ought; and, the Court having taken off a great deal more than a sixth part of his bill, there is no doubt I act equitably, following the principle of the legislature, by saying, that as to so much of the suit as relates to that bill, he shall pay the costs.

It was pressed, that I should now direct the account, with rests, and, further, call upon him to pay costs as mortgagee. Upon the allegations of this bill, the shape of the record is an objection to directing the account in that manner; and I should take from him the opportunity of answering, as the justice of the case should require, that the interest account upon the one side and the other should be taken.

It is then asked, is he to have his costs as far as he is mortgagee? Though a mortgagee, acting reasonably as such, is to have his reasonable expenses, it does not follow, that he can claim his own expenses from other persons, with whom he is litigating, with regard to those acts, which, upon his part, are not only unreasonable, but grossly oppressive. He was under an obligation [586] to bring into the Master's office clear accounts, capable of being clearly vouched; for he is not a mere mortgagee, but became so in consequence of his transactions as agent. Is he to charge the estate with all the expense attending a useless and unnecessary litigation in the Master's office? He is not, therefore, entitled to his costs in this cause as mortgagee. It is a very different consideration, whether, being a mortgagee, he is to pay the costs of the mortgagor: if any, it is to be considered, what costs; for the suit goes to other accounts, with other encumbrancers; and to points, as to which, to a certain extent, he must have had costs. It is admitted, there is no instance in which a mortgagee has been called upon to pay costs; and it is clear, as to some, he cannot; for some are the necessary effect of the suit to redeem. It is said, it will be an extremely bad precedent to hold, that in no case a mortgagee can be called upon to pay the costs of the mortgagor. I will not say, the Court will not, and am very far from saying, the Court ought not, to make that precedent: but it ought to be

1802. DETILLIN v. GALE.

made upon great consideration; for though it is a very clear moral proposition, that the mortgagee ought to pay all costs his unnecessary and oppressive dealings have occasioned, yet I have learned, that there may be great wisdom in a general rule established for a great length of time; though, perhaps, at the instant it is considered, that may not be discovered. The costs of the inquiry as to what was due must be paid by him, and when the course of his proceedings, from the answer till the cause came here, is stated to me beyond all possibility of contradiction, it would be a disgrace to the Court to give him the costs incurred by such conduct. I will give him his costs down to the answer, and no further.

A few days afterwards, The Lord *Chancellor* observed, that, in the case of *Shuttleworth* v. *Lowther*, the late Lord *Lonsdale*, a mortgagee, was made to pay costs on the ground of a tender, and an appropriation of the money, which was paid into the bank, and refused. [587]

[* 588].

THOMPSON v. LAMBE. (1)

August 13th.

Evidence not to be received by the Master, after he has settled his report.

A party charged by his answer or examination cannot discharge himself by it, unless the whole is stated as one transaction; as that on a particular day he received a sum, and paid it over; not, that upon a particular day he received a sum, and on a subsequent day he paid it over. (2)

AN exception, taken to the Master's report, charging the defendants with a sum of money, was overruled by Lord *Rosslyn*, upon the 13th of *March*, 1801. The exception came on to be reargued, upon the petition of the defendants.

Mr. Mansfield, and Mr. Cox, in support of the Exception, made two objections to the report: first, that the Master refused to receive further evidence, because produced after the report was settled.

Secondly, that the defendants, who were charged by their answer, were also by their answer discharged.

Mr. Romilly, and Mr. W. Agar, insisted, that the practice is, that, after the report is settled, the Master cannot receive any other evidence; which was decided in a late case at the *Rolls*, *Fearon* v. *Dawes*: the plaintiff, after the Report settled, having brought in affidavits to prove a more considerable balance, the Master refused to attend to them; and upon an exception, it was determined that the Master did right.

The Lord CHANCELLOR. In some respects, this is material to the practice. The course is this. The party claiming under the order is to lay a state of facts, or charge, before the Master; who * calls upon the other party, to the intent that he may suggest objections. In the nature of things, practice must have set some limits to this species of proceeding upon all these warrants. The

{(1) Cited 2 Johns. Cha. Rep. 91, *note*.}

{(2) *Hart* v. *Ten Eyck*, 2 Johns. Cha. Rep. 62. and the note to *Ridgeway* v. *Darwin*, ... p. 404 }

1802. THOMPSON v. LAMBE.

Master gives due notice, according to the course of the Court, that his report is to be settled on a particular day. What is he to do? The extent of the mischief is obvious, if the Master is to proceed up to the point of settling his report, before the parties, without any consideration of respect to the Master, state what they mean to prove, or by what proof. The rule must be, that he who will not produce his proof before that stage, must be told he comes too late. I am glad to hear of the decision of this point in *Fearon* v. *Dawes;* for otherwise the Master would be subject to the negligence of any one; and no suitor could hope for an end of his cause. (a)

Upon the other point, I am clearly of opinion, a person charged by his answer cannot by his answer discharge himself; nor even by his examination, unless it is in this way: if the answer or examination states, that upon a particular day he received a sum of money, and paid it over, that may discharge him: but if he says, that upon a particular day he received a sum of money, and upon a subsequent day he paid it over, that cannot be used in his discharge; for it is a different transaction. (b)

Exception overruled.

(a) Upon a motion, the following day, where a party would not attend the Master, for an order upon the Master to make his report, The Lord *Chancellor* refused to make that order; inferring, that the Master had some reason for it, and his Lordship, referring to the case of *Thompson* v *Lambe*, expressed a wish that the Master would be strict upon those who would not attend them, and make reports *ex parte;* adding, that the Court would always support them in such cases

(b) *Ridgeway* v. *Darwin, ante,* 404.

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[589]

HOLE *v.* THOMAS.

August 16*th*.

Injunction between tenants in common against destruction: not against pure equitable waste. (1)

A real estate was devised to trustees for 500 years, without impeachment of waste; and from and after the expiration of that term, as to one-third, to the use of *Susannah Elizabeth Thomas*, for life, without impeachment of waste, except wilful waste, in letting down houses; remainder to trustees to preserve contingent remainders; remainder to the use of the heirs of her body; and for default of such issue, to the use of her right heirs for ever. Another third was devised to *Mary Hole* in the same manner, and with similar remainders to *Susannah Elizabeth Thomas;* and the remaining third to *Mary Frances Thomas*, and the heirs of her body, in the same manner; with limitations over, in moieties, to *Susannah Elizabeth Thomas* and *Mary Hole*, and the heirs of their bodies, and the ultimate limitation to their heirs respectively.

Mary Hole and her late husband suffered a recovery to the use of *Mary Hole* in fee. Upon the marriage of *Mary Frances Thomas* with *Henry Byne*, articles were executed for suffering a re-

(1) See *Hawley* v *Clowes*, 2 Johns. Cha. Rep. 122, and observe the facts of the case.

covery, and settling her third part; with the ultimate remainder to her in fee. — 1802. HOLE v. THOMAS.

A motion was made, upon a bill filed by *Mary Hole*, for an injunction to stay waste by *Henry Byne*. The affidavits stated, that the defendants, in *May* and *June*, cut coppice wood; that those months were the improper season; that in *June* they cut 20 oak timber trees, improper to be felled, not being one-third of their growth; that *June* is the improper season for cutting oak; that they cut and continue to cut a considerable number of fir trees; and, the deponents believe they intend to cut the beech trees in the park and avenues, and the Barton: and that those trees are ornamental, and a shelter to the mansion house and estates; and the cutting them will be an irreparable injury. [590]

Mr. W. Agar, in support of the Motion.

The Lord CHANCELLOR. I never knew an instance of an application to stay waste by one tenant in common against another: one tenant in common having a right to enjoy as he pleases. (a) The principle in the case of the tenant for life is, that he is to take according to the will of the testator or grantor. A case of malicious destruction may be a ground: but a great part of the subject of this motion is pure equitable waste. I have no objection to grant an injunction against cutting saplings and any timber trees or underwood at unseasonable times, until answer or further order; for that is destruction.

Ordered accordingly.

BAILEY v. HAMMOND.

ROLLS. *August 16th.*

Payment ordered, where one party entitled had not been heard of for 20 years, upon a recognizance to refund in the event of a claim. (1)

THE testatrix bequeathed 2000*l.* to each of her brothers and sisters as should be living at her decease, and to the child or children of such other of her brothers and sisters as should be then dead, in such shares and proportions as they would take under the Statute of Distributions. (b)

There were several nephews and nieces. The administratrix of one of them, a son of a sister of the testatrix, presented a petition for a transfer. Only one brother of * the testatrix was living at her death; who had not been heard of for 20 years. [*591]

Mr. Cooke, in support of the Petition, said, that in a case under such circumstances, the Court had paid the money to the party, upon a recognizance to refund, in the event of a claim.

The MASTER *of the* ROLLS adopted that course; and made the order accordingly.

(a) Mr. *Lloyd* (*Amicus Curiæ*) mentioned the case of *Paris Mountain*; where an injunction was refused on the same principle. See *Smallman* v *Onions*, 3 *Bro. C. C.* 621.

(b) Stat. 22 and 23 *Char.* II. c. 10. 29 *Char.* II. c. 3.

{(1) See the orders in *Brown et ux.* v. *Cattell*, and *Shackleford et ux.* v. *Buchanan*, 1 Dess. Cha. Rep. 112. 570.}

1802.

August 17th.

The old rule, that the next of kin of a lunatic, if entitled to his estate upon his death, was not to be committee of the person, is not now adhered to. (1)

Ex parte COCKAYNE.

THE petitioner, being brother of the half-blood of a lunatic, and entitled in remainder to his real estate, was appointed committee of the real estate: but objecting to be appointed committee of the person, another was appointed.

The petition prayed, that the petitioner may be appointed committee of the person; having made the objection under a conception that the appointment would be against the practice upon the old rule.

The Lord CHANCELLOR agreed with the counsel, that the old rule had not been adhered to for a great length of time; (*a*) and made the order.

(*a*) *Dormer's Case*, 1. *P. Will.* 262.
The distinction, upon which, in *Neal's Case*, and *Ex parte Ludlow*, 2 *P. Will.* 544. 635, that rule was considered not applicable to the next of kin, from their interest in the probable increase of the personal estate during the life of the lunatic, is not satisfactory. To those, upon whom the suspicion, which was the foundation of that rule, could attach, immediate gain is a stronger temptation than the hope of future advantage, subject to disappointment, not only by the casualties of life, but also, where the state of the lunatic admits it, by the liberal application of his income for maintenance.

[592]

August 19th.

Separate creditors, who had taken a joint security, permitted, on giving it up, to resort under a Commission of Bankruptcy to their original debts.

Ex parte LOBB.

THE case, upon the petition and the affidavits in support of it was, that the petitioners, linen-drapers, sold goods to *Seward* and to *Pipon* separately. *Seward* and *Pipon* were in partnership, as merchants, at *Southampton*. The debt from *Seward* amounted to 80*l.*; that from *Pipon* to 167*l.* 8*s.* 10*d.* The goods were delivered to each separately: they were debited in the books so; and the transactions were entirely separate. The petitioners had at various times goods returned, consigned to them by *Seward* and *Pipon* as partners, to the amount of 48*l.* 18*s.*; and there were also some small separate accounts between each of the petitioners and *Seward* and *Pipon*. In *January* last, *Pipon* came to the petitioners for the purpose of settling his accounts and paying his debts; and at the same time he expressed a desire to settle and pay the bill due from *Seward*, and every other matter of account between the petitioners and them. The petitioners, at his request, as the easiest mode, made out one general balance sheet of the said debts, due jointly as well as separately: upon which the balance due to the petitioners was 112*l.* 7*s.* 3*d.* *Pipon* undertook to settle with his partner; and the petitioners with each other; and, by the desire of *Pipon*, a bill at two months was drawn upon him and *Seward* for the balance. Before the bill was due, *Pipon*

(1) *In the matter of Mary Livingston*, 1 Johns. Cha. Rep. 436.

1802. Ex parte LOBB.

and Seward became bankrupt. The petitioners applied to prove their original debts against the separate estates: but their proof not being admitted, the petition was presented; praying, that the petitioners may have relief under the Commission: and prove their said debts, so as to have the full benefit of the separate estates.

Mr. Richards, for the Petitioners, said, it was merely intended to take the *Lord Chancellor's* opinion; and no one appeared on the other side. [593]

The Lord CHANCELLOR said, clearly they must give up the bill; and that being admitted, his Lordship made the order; observing, that the point, whether by taking the joint security they were not concluded, might bear argument, but he thought they might resort to their original debts.

CASE OF THE DANISH SHIP NOYSOMHED.

August 14th, 16th, 20th.

The appellant from a decision of condemnation by the Admiralty Court, is not bound to adhere to the security given; but may follow the property or the proceeds in the hands of an agent. (1)

The Prize jurisdiction extends to the question, whether a person, who received and sold the property, received it as consignee for valuable consideration, or as prize agent.

A prohibition therefore against a monition to bring in the property or the proceeds was refused.

THE Danish ship *Noysomhed* was detained in the *West Indies* by a British ship; and the cargo having been condemned as lawful prize by the Admiralty Court of *Tortola*, the owners appealed to the Lords Commissioners of Prize. The cargo being sent by the captors or their agents to *Chorley*, at *Liverpool*, was sold by him. The Court of Appeal reversed the sentence; and decreed restoration; and that the captors should bring in an account of the proceeds within a month; and under that decree a monition to bring in the proceeds issued against *Chorley;* who moved for a prohibition; and by his affidavit, represented that the property was consigned to him, not as prize agent, but as a general merchant, for the purpose of sale; and that he sold it; *and placed the produce to the credit of the consignors; and has since paid to or accounted with them for their respective shares.

Mr. Mansfield, and Mr. Steven, in support of the Motion.—If the Lords Commissioners of Prize have a right to follow the proceeds of prize property *in infinitum*, they are right in assuming the jurisdiction in this instance. But they can only take from the captors or the sureties, or those who have property in their hands as prize. This property was consigned to *Chorley*, not as prize agent, but for the purpose of sale, as a general merchant, connected with the house from whom he received it. There is no difference between applying the money to the account of his correspondents, and actually paying them the money. His right to do either stands upon this ground; that, when the captor has given sufficient security, *viz.* security approved by the Court, that he will either restore the cargo, or pay the value, he has a right to dispose of it; and the appellant must rely upon the security; for keeping it would be a burthen. If the jurisdiction of the Court of Prize does not stop here, there can be no limit, so [*594]

{(1) See *The Collector*, 6 Wheaton, 194.}

1802.

Case of the DANISH SHIP NOYSOMHED.

long as the proceeds can be traced. According to the meaning and the letter of the Act of Parliament *(a)* after condemnation and delivery to the captors, notwithstanding the appeal, the property is vested in him: his vendee takes it to his use: the jurisdiction of the Court of Prize is at an end; and the notice of the appeal is immaterial. It could never be intended, that perishable goods should remain without any power of disposition. In that case there is a necessity for a conversion; and it is provided for by the Act. After sentence there must be a power of sale; and
[595] the captor receiving the price, effectually exonerates the thing from any claim of the original owner. In *Smart* v. *Wolffe (a)* Lord *Kenyon* was of opinion, that a change of *property* should be a bar to a monition. Where a Court of Prize or inferior Court misconstrue their jurisdiction, it is a ground of prohibition. In *Brymer* v. *Atkins (b)* that is laid down by Lord *Loughborough;* and in *Horne* v. *Lord Camden (c)* the reversal of the judgment of the Court of *Common Pleas* does not proceed upon the denial of that principle of law.

Mr. Romilly, and Mr. W. Agar, against the Motion, referred to *Le Caux* v. *Eden, (d)* and *Lindo* v. *Lord Rodney, (e)* as to extent of the Prize jurisdiction; and proceeding to maintain the right of the appellant to go against the proceeds, were stopped by The Lord *Chancellor;* who said, there was no doubt the party is not bound to content himself with the security; but may look to the goods themselves.

The Lord CHANCELLOR. My present opinion is, this is not a case for a prohibition. It is asserted, that under the true construction of the Act there is no remedy except against the captor and his sureties, with the exception of prize agents: but there is nothing in taking that security, that prevents this at least; that the party may go against the captor or the prize agent for the proceeds, if they are much more than the value in the security; which I take to mean the appraised value. The security means
[596] only, that he shall call upon the captor to restore, if he can, in specie, or, if he cannot, the appraised value. But you have a right to fix him with the proceeds, if you can; and then go to the Court of Prize for a monition and process, to take them out of his hands. There is nothing to prevent the prize agent from suggesting, that the proceeds are in his hands, not as prize agent, but by consignment for valuable consideration. But the Court of Admiralty must have the power to try, whether they are in his hands as prize agent. That is consequential upon the jurisdiction to call for the prize. I do not take them as deciding, that a consignee for valuable consideration, authorized to hold the proceeds for his own benefit, would hold them as an agent, out of whose hands they might be called: but they seem to have thought,

(a) Stat. 33 *Geo.* III. c. 66.
(a)* p. 595. 3 *Term Rep.* 323. See page 342. *(b)* 1 *Hen. Black.* 164.
(c) 1 *Hen. Black.* 476. 2 *Hen. Black.* 533. 4 *Term. Rep.* 382. 6 *Parl. Cas. Oct.* 205.
(d) *Doug.* 571. *(e)* *Doug.* 591, note.

1802.

Case of the DANISH SHIP NOYSOMHED.

they might examine that question; and that *Chorley* had not satisfied them, he had the proceeds otherwise than as agent for the captors; or, which is the same thing, for their agent. I understand the affidavit, that they were sent to him by the agents for the captors. It is one thing to say, he received these sugars in the course of a mercantile transaction, with authority to apply the proceeds of these sugars, as he would their own, regularly remitted to him; and a different thing, that they were not remitted to him upon their own account, but as agents of the captors; and that he carried them to their account in the same character; and then without authority he abstracts the produce from the account with them as agents of the captors, to his private account with them. The question, therefore, decided by the Court of Admiralty is, that this property was in the hands of *Chorley* as agent of the captors; a question incidental to the principal question, fitly decided by them; and therefore, I think they had jurisdiction. Want of allegation in these cases is strong negative proof; and from the short explanation given, I rather think he did receive as agent. [597]

August 20th.

The Lord CHANCELLOR. I have looked into the cases, and am of opinion, I am not authorized to grant a prohibition.

Ex parte BARCLAY.

August 19th, 20th

Bills, in lieu of which other bills are given, if permitted to remain with the holder, and the latter bills are not paid, may be enforced.

Notice, that a bill is dishonoured, to effect a discharge, must come directly from the holder. (1)

BENJAMIN CLAY, indebted to the petitioner to the amount of 422*l.* 3*s.* 4*d.* in *August*, 1800, endorsed to him two bills of exchange, drawn by *Kemp*, at two months date, upon *John Dearlow*, for 100*l.* each, and dated the 28th of *August* and the 2d of *September*. Those bills were neither accepted nor paid. *Clay* afterwards drew two bills upon *Samuel Sampson*, payable to the petitioner or order, one dated the 11th, the other the 16th, of *November*, 1800, for 100*l.* and 103*l.* the amount of the former bills, interest, and charges. The former bills were permitted to remain with the petitioner whose debt exceeded the amount of the four bills. The two last bills were not accepted: but *Sampson* paid that for 103*l.* when due. The petitioner placed all the bills generally to the account of *Clay*. *Kemp* and *Clay* became bankrupt. Proof of the two former bills under the commission against *Kemp* was rejected, on the ground, that the two latter were accepted in satisfaction and discharge of them; upon which the petition was presented, insisting, that they were not so accepted; and praying, that the petitioner may be admitted to prove the two first bills, or one of them.

Another objection was taken; that notice to *Kemp*, that the bills were dishonoured, did not come from the petitioner who was the holder, but from *Clay*.

{(1) *Stanton et al.* v. *Blossom et al.* 14 Mass. Rep. 116. See *Bank of Utica* v. *Smith*, 18 Johns. Rep. 230.}

1802.

Ex parte BARCLAY.

Mr. Pemberton, in support of the latter Objection, referred to *Tyndal* v. *Brown*; (*a*) in which it was held, that the notice must come from the holder; and must come up to this; that the holder looks to that party for payment.

Mr. Mansfield, in support of the Petition, insisted, that notice from *Clay*, having notice from the holder, had the same effect as notice directly from the holder.

The Lord CHANCELLOR. If two bills are dishonoured, and two others are given "in lieu" of them, but the former are allowed to stay in the hands of the holder, that fact will give a construction to the words "in lieu;" and the meaning will be only, in case they are paid.

As to the other question, whether the holder not having given notice himself to the drawer, that the bills were not paid, can avail himself of the notice given by another person, who had not the bills, I shall look into the cases.

August 20*th*.

The Lord CHANCELLOR. The settled doctrine is according to the language of Mr. Justice *Buller* in *Tyndal* v. *Brown*; and there is great reason in it; for the ground of discharging the drawer is, that the holder gives credit to some person liable as between him and the drawer. Notice from any other person, that the bill is not paid, is not notice, that the holder does not give credit to a third person. The doctrine has been acted upon very often since.

Petition dismissed.

(*a*) 1 *Term. Rep.* 167.

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[599]

August 10*th*, 11*th*, 23*d*.

BEAUMONT *v.* BOULTBEE. (1)

Accounts opened, and a general account decreed, against an agent, who was also tenant to his principal, in respect of fraud.

The character of agent accompanying him in his situation, as tenant, deprives him of the benefit of an objection that might be competent to another person; as the laches of the plaintiff in not bringing forward the demand at an earlier period.

The decree affirmed on a rehearing.

THE decree in this cause (*a*) directed an account of the quantity of coals got from the *Newbold* colliery beyond 10,000 loads in every year during the lease, dated the 1st of *August*, 1760, and of the value thereof; and an account of what was paid by *Joseph Boultbee*, deceased, to *Edward Dawson* and *John Cotton* respectively for the purchases from them; and interest to be com-

(*a*) Reported, *ante*, vol. v. 485.

{(1) Cited 3 Johns. Cha. Rep. 479.}

puted thereon at the rate of 4 per cent. *per annum* from the respective times of payment, until *Boultbee* had raised so much coal beyond the quantity of 10,000 loads in each year as was sufficient to repay such sums of money so paid to *Dawson* and *Cotton*, with interest thereon, computed as aforesaid; and that what should be found due in respect thereof should be deducted from the value of the overplus of coal got from the said colliery. The Master was directed to inquire, whether the defendant would elect to convey so much of the estate, called *Rotten-Row*, and the manor of *Thringston*, as remained unsold, to the plaintiff; and in case the defendant should not elect to make such conveyance, it was ordered, that he should pay the value of such overplus of coal, after such deduction, as aforesaid, to the plaintiff; and if the defendant should elect to convey, then the Master was also to take an account of what was paid by *Joseph Boultbee*, deceased, for the purchase of the said estate, and compute interest on the said purchase at the rate of 4 per cent. *per annum*, from the time of payment of such purchase money, after deducting what had been received for the part of the said estate sold; and in such case it was further ordered, that what should be found due for principal and interest of the said purchase money after such deduction, as [600] aforesaid, should be deducted from the aforesaid value of the overplus of coal got from the said colliery; and in such case it was further ordered, that the defendant should convey so much of the estate, called *Rotten-Row*, and the manor of *Thringston*, as remained unsold, to the plaintiff, free from encumbrances.

A petition was presented by the defendant; praying a rehearing of so much of the decree as directs him to account for the extra quantities of coal got by *Joseph Boultbee*, deceased, from the said colliery, beyond the 10,000 stack loads *per annum*.

Mr. Mansfield, and Mr. Hart, in support of the Petition of rehearing, insisted principally upon the length of time elapsed before the demand: a demand set up against an executor; the property having been disposed of under the impression that no such demand would be raised; the vouchers lost; &c.

Mr. Richards, and Mr. Stanley, in support of the Decree, urged the ignorance of *Bridge* upon the subject; and the duty of *Boultbee*, in a situation of trust and confidence, to protect his employer in his dealings with any other person, much more in any bargain with himself. They compared it to the case of *Gibson* v. *Jeyes*, (a) a sale by an attorney to his client, and, with reference to the advantages gained by dealing with the owners of the adjoining collieries, to the cases of trustees and executors dealing with the trust property for their own benefit. (b) Admitting the hardship in many cases of proceeding against an executor after a considerable length of time, when vouchers may have been lost, &c. that objection, it was insisted, was not applicable to a case where there was no suggestion of that fact, and no doubt [601]

(a) *Ante*, vol. vi. 266.

(b) See *Ex parte Hughes*, *Ex parte Lacey*, *Lister* v. *Lister*, *ante*, vol. vi. 617 625. 631. and the references.

1802. BEAUMONT v. BOULTBEE. that the money was still due: the son also having assisted his father in all the transactions; and the disposition made by the father of his property being necessarily subject to the consequences of having acted in this manner.

August 23d. *The Lord* CHANCELLOR (after stating that part of the decree which was the subject of the petition.)

The bill also prayed relief; which appears to have been denied by the decree; particularly an account of all dealings and transactions from 1783 to the settlement of the last account; and relief is prayed, if the Court does not think proper to open those accounts, for liberty to surcharge and falsify. Neither relief was given as to so much of the transactions up to the last settlement of accounts: but the Court has contented itself with giving the account from the foot of the accounts so settled.

The petition applies only to one particular direction; and it will be necessary for understanding this case thoroughly, and will be some security for a right decision, to consider all the circumstances of the transaction, from 1757 to the filing of the bill; certainly taking care, that inferences arising from one transaction shall not press too much upon the judgment to be formed as to another transaction: but every transaction in the history of the business is in some degree to be considered with regard to every other transaction in the same period.

It seems, a person named *Yarwood*, a relation of *Boultbee*, was in possession of the property at some period previous to 1757.
[602] At what time *Boultbee* himself came into the possession, I cannot determine; as there is a different result from the papers. There is something like an agreement for him to take possession in 1756: but from the accounts, he does not seem to have taken possession till 1757. He took possession, as it appears from those accounts, previous to the lease, at a rent of 200*l.* a-year as to the colliery; for they give credit to Sir *George Beaumont* for that rent previous to the lease. Also, in a very early period of the accounts, (1760,) before the lease, there is a document, an account settled, which has a tendency to show, what was the nature of the duty *Boultbee* took upon himself for the salary of 20*l. per annum;* for though subsequent to the lease, that salary was frequently and generally charged dryly for collecting the rents, yet the first time there is any mention of the duty in the accounts, the entry is thus made: "For looking after your estates and collecting your rents for "one year."

And it is impossible, upon the letters, and attending to the conduct of the present defendant when his allowance was raised from 20*l.* not to perceive that it was understood that there was attached upon him the duty of an under-steward, subject certainly to the revisal of a superior steward, as usual in the case of a gentleman of large fortune, who cannot personally manage his own affairs. There is decisive evidence, under the hand of the *Boultbees*, that it was the duty of *Boultbee* to look after the estate rather

more than merely collecting the rents; and that on that account he had the property cheaper, in addition to his salary of 20*l.* a-year. There was an obligation resulting from the duty of the mixed character of tenant of the colliery and part of the estate, and in a sense the manager of the whole estate. It was * not in the nature of things, considering *Bridge's* residence and engagements, that he could control, as a duty upon him, for the improvement, melioration, and management, of this estate, except acting by *Boultbee's* advice: and I agree with Lord *Rosslyn*, as represented in the report, that, to a certain extent, a duty was imposed upon him, proposing to derive interests in the estate, to represent truly what he knew of it from his intercourse with it as steward. It appears, by a letter, dated the 1st of *June*, 1757, in *Boultbee's* hand, that he had been as early as that date dealing with *Dawson* for the coals in his land; and at that time dealing on behalf of Sir *George Beaumont*. [* 603]

It is necessary to give very particular attention to the contents of the lease. I am not able to satisfy my mind, how this lease, upon the face of it, only reserves the rent of 140*l.* a-year; when it is clear, 200*l.* was the stipulated rent, paid up to 1760; and a bond was given for the additional rent of 60*l.*; whether it was upon some management with respect to the public taxes, or what was the plan, I ought not to conjecture, and certainly I cannot determine; for there is no evidence upon it. This is a dead rent. It was not to be apportioned with regard to the quantity of coals got: but that rent was to be paid at all events. The lessor seems to think it for his benefit to have what they call a going or working colliery; and undoubtedly in many instances it prevents the customers going elsewhere. Therefore an obligation was expressly imposed upon *Boultbee*, that he should work the mine, and in a husbandlike manner; and a great variety of expression is used for that purpose; and a power of inspection is reserved to the landlord and his agents; and there is an express covenant by *Boultbee* to deliver up, at the end of the lease, all the premises, and expressly to keep in repair the fire engine, and at the expiration of the lease to deliver it up in at least as good condition as it was at the beginning of the lease. Then he covenants not to work beyond 10,000 loads in any one year. [604]

This lease, when we are considering the effect of it in a Court of Justice, is a bargain with which the parties at the time must be taken to be perfectly contented. It must be taken, that Sir *George Beaumont* was content to demise this property, and it is not necessary to look for the present at the charge that he had not sufficient information; and *Boultbee* must be taken to have been content at that time to take the premises, such as they were, and in such condition: the engine in the state of repair in which it then was, and all the premises as they were; and with the obligation to work the colliery according to his covenant; and the necessary effect is, that if the machinery should not be sufficient during the lease, he must be understood to be content with the obligation at his own expense to make it sufficient. There is also a covenant which imposes upon him, as a duty, not merely to place himself

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in a situation to be called upon to make satisfaction for a breach of his covenant, but to observe it, and making it his duty, generally speaking, to forbear working any coal beyond 10,000 loads. Having entered into the lease, he recollected that he might take more or less in different years, and therefore there would be an inconvenience in being limited to that quantity in each year; and that, upon the whole, it was not expedient between lessor and lessee; for I now put it so. I doubt a little, whether that construction of this memorandum, which supposes that the account of these over-workings could not be settled till the end of the lease, was the necessary one; though it is clear, *Boultbee* acted upon it, as if that was the construction; for no account of the quantity of the
[605] over-working was made up till 1780. That memorandum is a material stipulation, having reference to the covenant in the lease, intending to secure to Sir *George Beaumont*, that, if the colliery should be thrown upon his hands at the end of the lease, it should be a going, working, colliery; and he should take possession of a colliery producing a profit. Nothing material occurred from the execution of the lease till 1769, except that accounts were rendered to *Bridge* of the rent of the colliery, of the management in a sense; for I take the letters accompanying those accounts to be important evidence as to the duty with which *Boultbee's* character clothed him; and these accounts, in common with those down to 1780, are accounts with regard to which, though *Bridge* was put in possession of the vouchers as to other persons, he was not as to the accounts between himself and *Boultbee*.

I should have had very strong doubt, whether, attending to the character in which *Bridge* and *Boultbee* stood, it was competent to the latter, if the equity was pressed to the utmost, to complain of a decree going a great deal further upon dealings and transactions between 1783 and the date of the decree, than a decree which does not touch any account in that period; whether it is competent in any under-steward to be permitted to take advantage of accounts, as settled, which he, owing a duty to his master, knew another, owing also a duty to his master, had not settled with those forms, and that production giving authenticity to settled accounts as such; and it would have been a very considerable time, before I should have parted with those parts of the case, without giving a complete liberty to surcharge and falsify all those accounts, and upon that ground. This is material in another view; for such a transaction as an under-steward, between 1757 and 1794, having settled all accounts with the upper-steward without
[606] vouchers, and upon mere confidence, amounts to most weighty and momentous evidence of the confidence reposed, and comes to be material, as evidence of the extent and amount of that confidence, when the transaction took place, in 1780.

In 1763, the old engine, which *Boultbee* was under covenant to repair, and to leave in a specified state of repair, seems to have been abandoned by *Boultbee;* and I have no doubt, that was upon some agreement or understanding with *Bridge;* for I perceive, in the account of 1764 or 1765, *Boultbee* takes notice that he had fallen a quantity of oak wood, which he says he is to be at liberty

to apply without charge to the new engine. That account seems evidence, that the nature of the transaction was, that if *Boultbee* did not choose to go on with the old engine, under the obligations of the covenant, those obligations were to be transferred to the new engine; and he was content with that stipulation, provided the lessor only gave him timber necessary for the erection of the new engine. That is also the inference from this; that in a paper of *May*, 1766, there is an express article as to repairing the engine; and the lessor was to furnish nothing but a new boiler; which, it is evident, is not a very essential part of the expenditure of the repairs. It is incumbent upon *Boultbee* to show, that was not the nature of the transaction; for there is no express written contract between him and his landlord.

From 1763, there is nothing to observe upon till the contracts with *Dawson* and *Cotton*. The contract with *Dawson* was one *Boultbee* had in view as early as *June*, 1757; as appears from a paper of that date; and I will take it for this purpose, that it is not open to the observation, that there was a breach of trust from the communication of the level: but I take it as furnishing this question: upon what terms, as between him and his landlord, could *Boultbee* acquire, by virtue of the command his tenancy gave him, such an interest in their coal, as it appears he did acquire in that coal, by looking into his express contracts with those persons. [607]

The contract with *Dawson* was concluded upon the 6th of *February*, 1766; and contains these conditions: "but" (which is very important) "without sinking or making any pit or pits, and" (which is also very important) "without liberty of stacking or "placing such coals, when got, or" (which is also very important) "of making any roads, &c.;" and there is an express covenant by *Boultbee* to take the coal in this manner, without any of these easements upon the surface of the ground.

The contract with *Cotton*, in 1772, I need not state particularly. It was to get the coal under his land in the same manner, and with no more liberty and easement upon the soil than as to *Dawson's*.

Then see how it stands. *Boultbee* being tenant to Sir *George Beaumont*, and Sir *George Beaumont's* colliery furnishing the level, with which the coals under *Dawson's* and *Cotton's* lands could be got, and without which their coal could not be got, *Boultbee* does not contract with them to get their coal, merely taking advantage in his character of tenant to Sir *George Beaumont*, having in that character the level that would enable him to get their coal: but having that advantage which alone would enable him in any manner to get the coal, he agrees, in effect, to sell to them the benefit of that level, which is not his to sell; provided they will let him enjoy their coal in a way in which he could not without the leave of Sir *George Beaumont*; expressly undertaking to dig no shaft, to stack no coals, &c. but through his colliery to bring those coals to bank, and upon his land to stack them, from his land to sell them, and upon his land to make use of all the easements and liberties of pits, wagon-ways, &c. necessary for [608

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the sale of those coals. I should not hesitate to say, that in every act he did he was a wrong doer; unless he meant Sir *George Beaumont* to have the benefit. He was a wrong doer in selling the level, and all the other acts; and, as I should not infer that he meant to be a trespasser, unless that purpose is clear, the true effect of his acts, as evidence of his intention, is, that the benefit he had got as lessee, by the use of the property, should, upon reasonable terms, be acquired for his landlord, and not for himself.

Then, in 1780 those transactions occurred, upon which this petition is brought; and I think with Lord *Rosslyn*, that to a very considerable extent *Boultbee* was clothed by his character as steward, with the duty of representing generally the circumstances of the estates fairly to Sir *George Beaumont*, on behalf of all dealing for interests in the estate. But for the moment laying out of the question the obligation attaching upon him as steward, it is clear, towards the expiration of the lease he had broken his covenant by over-working; and if he took upon himself, for the information of the steward, to represent the terms upon which it was reasonable that the account should be settled, and took to himself the confidence of Sir *George Beaumont*, directly, or by taking to himself the confidence of *Bridge*, then he was bound to a reasonable and accurate representation; and it is difficult to discharge him from the obligation of the decree, taking it upon the transaction of 1780, and without looking more particularly at him in the
[609] character and with the obligations of steward. The representations began upon the 29th of *November*, 1780. The letter of that date contains an account of the coals got in 1757-8, 1758-9, 1759-60; and it states, that less than 10,000 loads was got in those years. I remark it; for, as steward, to any one else he would have said, it was quite unreasonable, that, when a man had the enjoyment under a contract, and paid his rent for three years, because he had got less than he stipulated for in those three years, any part of the rent should be called back 20 years afterwards, for reasons not directly connected with what passed 20 years before. That he would undoubtedly have said if he had been landlord instead of tenant.

With respect to the account, as given in the letter, and the payments to *Dawson* and *Cotton*, upon both those contracts, it is a question if it does not amount to the same thing by the calculation; for there would not be an excess, if those quantities are not taken in: but if that was not the result, it is too favourable to him to say, he was to take those coals as tenant to Sir *George Beaumont*: rather he must acquire them, or the full value, for his landlord, subject to just allowances only: I do not enter into the consideration, whether this was sent studiously, with all this dark expression, to the person who was to understand it, if any one could; for *Bridge* had dealt with *Boultbee* in all the transactions. No one else knew any of them. But it appears *Bridge* did not understand it.

With respect to *Bridge's* letter of the 13th of *December*, 1780, in answer, it is exceedingly true, a man in the relation of steward coming to enter into a transaction of compromise, may put him-

self altogether in an adverse situation; may divest himself of the character of steward altogether; and deal so that no one can state that *any confidence was reposed in him. This letter would, perhaps, by no means justify so much observation, if written to a man with whom *Bridge* was not in the habit of corresponding; that leading to a correspondence of a particular nature; but he is writing here in terms very much as if he was writing to any other tenant; and if *Boultbee* meant to get the best bargain his knowledge would enable him to get, one question is, whether having acquired that knowledge in the service of his master, it should be used for that purpose. No question could arise, that he might put himself in an adverse situation. But does he attempt to put himself in that character? He does not; and his answer to that letter amounts to a representation in nature of a warranty, that his advice was reasonable, and such as his two employers, (for I consider both Sir *George Beaumont* and *Bridge* as his employers,) might rely on; and advice of such character, that I would not take upon myself now to say, if the propositions had been acted upon more distinctly than they appear to have been, it would not have been within the power of the Court to relieve even in such a case. But it is not necessary to consider that. This letter (*a*) (printed in the report) is very material. The rough copy states, "I do not desire or expect any allowance." These words are struck out. I cannot read this rough draft of the letter, without being convinced he thought this a most impudent demand; so strong, that at first he could hardly pen the request. It is, to be sure, a very extraordinary demand in respect of short-working for three years prior to the lease in 1760, without any demand in that year with regard to that; and when it was his duty to make it then; the lease being made by his master upon consideration of all the circumstances; and the lessee dealing for himself then, upon those circumstances, with regard to all he then thought it reasonable to demand. The rough draft then goes on thus:

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"I am very willing to pay an additional year's rent of 150*l.* for "every 10,000 loads," &c. The words "I am very willing to "pay" are struck out; and he inserts as an assertion, that "the "most reasonable" and (not only that but) "the regular mode of "payment would undoubtedly be an additional year's rent of 150*l.* "for every 10,000 loads, which exceeds my quantity." With respect to the statement as to the purchase of the *Rotten-Row* and the manor of *Thringston*, there is evidence of a tender of that purchase to the guardians of Sir *George Beaumont*. The reason assigned, why that purchase ought to have been Sir *George's*, and not his, is very material; because it leads to the question, what is the construction of the proposition in 1780, and, whether it was ever carried into effect. The conclusion of the letter shows he expected an answer; and that answer was to close this proposition.

(*a*) The Lord *Chancellor* stated this letter, (See *ante*, vol. v. 490,) from the rough copy, which by accident had been sent to his Lordship with the papers in evidence. At the close of the judgment his Lordship said, it made no difference in his decision.

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This letter contains certainly some propositions which may be called argument, and some which may be called assertion or representation. He begins with argument as to the coal wrought in the three years. I do not say much upon it; for it is upon the face of it so glaringly unreasonable, so monstrously open to objection, that no one can doubt upon, or misunderstand it; therefore, if all the letter contained was such a proposition, I should say, there was a distinct, intelligible letter, upon which they either had or had not acted. As to the additional rent of 150*l.* it is a very different proposition to give that rent, and to state, as matter
[612] of fact, (and it can be nothing else than matter of fact,) that it is the most regular mode; which applies to a habit; and he adds the word "undoubtedly." There never was a more unreasonable proposition. It is also as little the regular mode of payment as any that can be suggested. What do the *res gestæ* in this cause furnish as evidence upon that? When, in 1784, the new engine was erected, and the colliery was to be wrought, upon his reliance that Sir *George Beaumont* would do what was reasonable, did *Boultbee*, in that or the subsequent year, imagine, that, if he was to get 5000 loads out of a coal pit, it was reasonable to increase the quantity to 10,000 upon the same terms? No: the bargain there is that which ought to have been made in this instance, that the additional quantity is to be paid for at a much higher rate, *viz.* 1*s.* 6*d.*: the payment for the original quantity being 1*s.* The reason is obvious. The labour, expense, capital, and work, are infinitely less, because so much has been employed in getting the original quantity. But if that is not reasonable where the lease permits you to get additional quantities, it is much less so where it forbids that; and therefore you have no right to propose an additional rent; and the additional quantity ought to be accounted for according to the justice resulting from the obligation of the contract not to take more: *viz.* an account of the value, deducting only just allowances: that is, for the labour of getting it. This is therefore a representation, false, if he had power to get more; and more palpably false, being forbid to get more.

There is a circumstance belonging to this case; that, though *Cotton's* coal was contracted for in 1772, and *Dawson's* at a different period, I cannot find that the facts of those contracts were ever communicated. No visit of *Bridge* to the colliery could inform him of it; and if *Boultbee* had given the communication he
[613] ought, he should have sent the contracts, and the express terms.

With respect to his statement as to the fire engine, it must be remembered, he was under covenant to keep the old engine in sufficient repair; and all he could in reason demand appears from that document to be the oak timber. What right had he to demand any thing in respect of that engine? Is it clear he had any right to dispose of the engine, supposing his tenancy put an end to, and considering his obligation as to the old engine? There never was a more improvident act, I do not say, blameable, for guardians do not like to enter into those speculations, than permitting *Boultbee* to be the purchaser of this estate of *Rotten-Row* and *Thringston*. The representation made by *Boultbee* was, that

it was to be purchased for 2000*l.* He himself gets it for 1600*l.* I do not recollect that the alteration of the price was communicated, which might be very material. In 1780, they were dealing for the terms upon which they were to part at the expiration of the lease, not with regard to the continuance of the relation of lessor and lessee. He speaks not of that which was deep coal at the time of the purchase, but of the future coal, and future operations necessary to get at the coal to advantage. Upon the latter part of the proposition, Lord *Rosslyn* has understood it to mean this; that if the account was to be closed, not merely an allowance was craved with regard to the difference between 10*l.* a-year, and the interest of 1600*l.* but that it was closed upon these terms; that what ought originally to have been Sir *George Beaumont's* should become his; which implies, that he should pay for it, without any thing said as to that: and that is the necessary construction of the letter, in my opinion: otherwise, it was a most unreasonable demand; if they were to part upon the terms that Sir *George Beaumont* is to have his old estate back, and *Boultbee* [614 to keep this; and if the assertion is true, that the coal could never be got to advantage without it. What consideration was Sir *George Beaumont* to have for paying the whole difference between 10*l.* a-year and the interest of 1600*l.* between the periods of the purchase and dissolving the relation? The consideration proposed was, that by means of that estate he will have the benefit of getting the deep coal adjoining. That benefit he cannot have, unless he has the estate. That proposition, therefore, necessarily must be taken to mean, that if the matter was to be settled upon the footing of this letter, it should include an arrangement making Sir *George Beaumont* the owner of that estate, and not leaving *Boultbee* the owner. Nothing was done upon that representation. The transactions afterwards took place as to building the new engine, and giving leave to get larger quantities of coal than was stipulated; and they go on till 1794, when the connexion was dissolved, and they quarrelled.

I make no observation as to the *Newbold* colliery; as to the rents of 220*l.* and 50*l.*; beyond this; that *Boultbee* had that colliery as he had all the others, upon these terms, in effect here stipulated, and stated to be fair and just. There is testimony to this effect, that at that time the *Newbold* colliery was thought to be failing: but they were dealing upon terms in that article, showing, that Sir *George Beaumont* was acting upon *Boultbee's* representation; and I cannot look at the subsequent transactions, the land-tax assessments, &c. without feeling this arising out of his conduct; that he felt a duty upon him to represent the state of the property; and that his interest had so much influence as to make him not quite true to that; and if Sir *George Beaumont* had not submitted to a decree fixing the rent of that at 220*l.* the Court would not have been justified in not carrying the case a good deal further.

These circumstances are evidence to show the transactions were grounded in confidence in *Boultbee;* which he knew he had, and

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knew he had accepted. There is a silence after 1780. That is all you can say. Nothing was carried to account in the subsequent period: nothing allowed in any settled account, as to the engine, the coal got in the three years, *Dawson's* and *Cotton's* coal, and the difference between the 10*l.* a-year, and the interest of 1600*l.*; and all those accounts were passed by *Bridge*, under the idea that *Boultbee's* accounts might be settled without vouchers. That was a very undue proceeding; and I am far from being sure, that it is a safe principle to hold, that accounts so settled are to be held settled, and even without an opportunity to surcharge and falsify. I do not meddle with it further than to confirm my opinion, that there was great confidence between these parties. I admit, there was no demand upon that head from 1780 to 1794: but the value of the objection from length of time, depends upon the complication and difficulty arising out of the subsequent transactions: particularly, where the original justice of the case is perfectly clear; as it is here; first, because there was no pretence for the demand as to the three years; secondly, as the assertion as to the 150*l.* a-year is, and may be shown to be false. Then there is very little colour for the demand as to the erecting the engine. As to all, therefore, of these three demands, none embarrass the consideration of the justice of the demand. I except the fourth; which stands upon a distinct consideration.

Then what is asked by the plaintiff in point of difficulty cannot be stated higher than this; that of the value of the 48,000 loads got previously to 1780, it being obvious that before that time the value ought to be rendered to the plaintiff, the account shall be taken. It is objected, that he has acted passively since. The answer is, that was upon representations by a person, meaning, that [616] the plaintiff should repose confidence in him; who accepted that confidence; and authorized him to deal upon what amounts to a representation that the confidence should not be abused; and it is to be remembered, this is not like what the case would have been, if all the accounts had been closed in 1780, and there had been no subsequent dealing; but, till 1794, facts appear amounting to demonstration, that a confidence was reposed, which was thought to authorize the most culpable negligence, and was not withdrawn till 1794.

These grounds are sufficient to support this decree. But, I am also of opinion, that this was a compromise upon terms, one of which was, an offer to the plaintiff of the estate purchased for 1600*l.* at that price; for otherwise there is no sense in what is said as to that estate, consistent with any just proposition. Until that proposal was determined upon, in that as well as in all other respects, it must be considered as treaty and proposal.

Upon these grounds I think the decree, in this part, is, upon the whole, right. I do not enter into the consideration of hardship. Considerable attention is to be paid to that, where there is any strong doubt as to the justice of the decision. It ought to be attended to in a reasonable degree, before the decision is come to; but attending to the circumstance, that the party is dead, it does

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not appear to me, that, within the rules and principles of the Court, this relief ought to be denied. It is true, *Boultbee* is dead: but if any thing passed between the plaintiff and *Bridge*, after the plaintiff came of age, a cross bill might have been filed; and considering the confidence between *Bridge* and *Boultbee*, the representations of the former to Sir *George Beaumont* must be taken in some degree to be *Boultbee's* representations. But considering the confidence between all parties, I should be very unwilling to [617] say, that the Master could be bound by any thing short of a clear explanation of the whole matter; an understanding of all that is reasonable and unreasonable, and a perfect disclosure of every thing enabling him to understand; such as any one would have given, if an express declaration had been made by the other, that he acted upon confidence. It is clear, *Bridge* did not mean to bind any thing by his own act. His letter states an intended communication to Sir *George Beaumont;* which might have been got at by a cross bill. To a given degree the complaint of want of information proceeds from that.

Decree affirmed.

Accounts settled between two agents, without vouchers, upon confidence, not to be considered settled against their principal, without liberty to surcharge and falsify.

The Lord CHANCELLOR added, that he should certainly have given leave to surcharge and falsify those accounts; considering it extremely dangerous, that accounts settled between two stewards in this way, should be considered settled accounts. The principle requires this to be guarded so as to prevent this decree from being considered as establishing, that this ought to take place.

Ex parte FORD.

1801. *December 26th, and several other days.* 1802.

(Three other Petitions.)

Order made in the case of *Drury Lane Theatre* upon the authority of the cases of the *Royal Circus* and the *Opera House.*

THESE petitions brought before the Court the affairs of the *Theatre Royal* in *Drury Lane;* which had fallen into a state of great embarrassment among various encumbrances and claims under the execution of a deed of trust.

* *The Lord* CHANCELLOR expressed great reluctance to entertain jurisdiction upon a subject so unmanageable; and said he would not, if the cases of the *Royal Circus* and the *Opera House*, (a) [* 618] had not been heard: but, that he was bound by those authorities. His Lordship observed, that the consequences of the interference of the Court, by appointing a Receiver upon such a property, must

(a) *Ex parte O'Reily, ante,* vol. i. 112.

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be ruinous; and that, of necessity, the first provision must be for those demands, without providing for which it would be impossible for the Theatre to go on: as the rent, the salaries of the performers, &c.

After a discussion in length without example, having taken up several days at different periods, an arrangement was proposed; according to which an order was made in the vacation after Trinity Term, 1802.

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(a) Determined, that the option is confined to the lessee. 3 *Bos. & Pul.* 399. 442.

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